IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	Docket No. 18 CV 00864
	)	
DEALER MANAGEMENT SYSTEMS	)	Chicago, Illinois
	)	February 12, 2021
ANTITRUST LITIGATION.	)	1:30 P.M.

TRANSCRIPT OF PROCEEDINGS - Hearing
BEFORE THE HONORABLE ROBERT M. DOW, JR.

APPEARANCES:

For the Dealership Class Plaintiffs:

MILBERG PHILLIPS GROSSMAN LLP
BY: MS. PEGGY J. WEDGWORTH
MR. ROBERT WALLNER
MR. MATTHEW A. KUPILLAS
One Penn Plaza, Suite 4800
New York, New York 10119
pwedgworth@milberg.com

For the Individual and Vendor Class Plaintiffs:

KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, PLLC
BY: MR. DEREK T. HO
MR. MICHAEL NEMELKA
MR. AARON M. PANNER
MR. DANIEL V. DORRIS
MS. BETHAN R. JONES
MS. JAYME L. WEBER
1615 M Street Nw
Suite 400
Washington, DC 20036
dho@kellogghansen.com

For the Defendants Reynolds And Reynolds Company:

GIBBS & BRUNS, LLP
BY: MS. AUNDREA K. GULLEY
MR. BRIAN T. ROSS
MR. BRICE WILKINSON
MR. JUSTIN D. PATRICK
MR. ROSS M. MacDONALD
1100 Louisiana
Suite 5300
Houston, Texas 77002
agulley@gibbsbruns.com

APPEARANCES (Continued)

For The Defendants Reynolds and Reynolds Company:
SHEPPARD MULLIN RICHTER & HAMPTON, LLP
BY: MR. LEO D. CASERIA
2099 Pennsylvania Avenue NW, Suite 100
Washington, DC 20006
lcaseria@sheppardmullin.com

For the Defendants CDK GLOBAL, LLC:
MAYER BROWN LLP
BY: MS. BRITT MILLER
MR. MICHAEL A. SCODRO
MR. MATTHEW D. PROVANCE
MR. DANIEL T. FENSKE
MR. JED W. GLICKSTEIN
MS. MEGAN E. STRIDE
71 South Wacker Drive
Chicago, Illinois 60606
bmiller@mayerbrown.com

Court Reporter:
KRISTIN M. ASHENHURST, CSR, RDR, CRR
Official Court Reporter
219 S. Dearborn Street, Room 2304-A
Chicago, IL 60604
(312) 818-6549
kristin_ashenhurst@ilnd.uscourts.gov

(The following court proceedings were held via video.)

THE COURT: This is 18 Civil 864, In Re Dealer Management Systems Antitrust Litigation. And this is the tutorial that I asked you all for, so thank you all very much. When I got the email the other day with the chart, it reminded me of something Judge Fallon always says, which is, "Why wouldn't you want an MDL if the JPML calls you, because you get the best lawyers in the world and you get really interesting problems to work on and they're pretty good at working well together." And this is definitely a manifestation of that. So thank you all for agreeing to this without having me or Judge Gilbert or anybody else from 219 South Dearborn involved. I appreciate that.

All I wanted to say before we get started, because I know you guys have a tight schedule here, is, first of all, thank you. Secondly, we're going to do this again. And when we do this again, I'm going to ask the questions, but I will provide them in advance so you guys know what's bothering me, because this is the way in really complex cases -- oh, my cat is about to -- now, if any of you have a cat or dog who shows up, I'll be very forgiving. He's left now.

So this is what I have done with really complex cases and motions, and your guys' certainly are in that category. I didn't count up the motions. Let me see here, you guys listed them all. Oh, no, you listed them under *Daubert* and other --

18, well, that's a lot. I was asking John, my law clerk, how many pages he thinks we have, and it was probably somewhere between 750 and 1,000, and that doesn't count the exhibits; that's just the briefs. So the purpose of today was for you guys to give us a little tutorial. The idea is what exhibits, what arguments, what cases are critical -- key -- the key things to focus on.

The other thing that would be really helpful is any links between these motions. So if your argument is that, if you exclude this expert, than this summary judgment motion becomes easier for you to resolve in our favor, that would be a really helpful point to make. Other than that, I do not intend to interrupt you all today, except for one purpose. Somebody has to be the bad guy today. Those of you who know me know that being the bad guy is a really hard thing for me to do, but I will at least say to you, "Your time is up." And when I say that, if you just conclude the thought you're on. This isn't like the Seventh Circuit where the trap door opens and you get dumped down to the 26th floor if you exceed your time, depending on who is presiding. But I do appreciate if you'll wind up when I say your time is up, only because you guys have worked out a very intricate schedule.

The other thing I will say is we're going to have to take a break about halfway through, and I'll sort of gauge that based on how much you guys use of the time you've allocated

yourselves, but at some point we'll take a break because it wouldn't be fair to Kris for me to ask her to type for three straight hours, which I certainly will never do.

And then once John and I get a handle on these motions and a good outline and probably start drafting, I will come up with a series of questions to ask you guys, which I will put on the docket. You will then know what's really bothering me. Sometimes those questions lead to another round of questions, which I don't know until I start hearing your answers. So it's not as if, the next time we have the hearing, you will have all of the questions in advance, but at least you will have some of the questions in advance and you will know what's bothering me.

And the purpose of having these two arguments is so that I can get this as right as I can, so you guys don't have to appeal me too many times, and you don't have to go appeal when you get back to your transferor courts, if you end up back there, too. So I'm just trying to get them right, and I know with this many really good lawyers, you guys can help me. In many cases I look at it and I say, "You know, I would like to have a hearing, but I don't think it's going to help me." In this case I know it will help me, so I thank you for that.

And the only other thing I want to say is there were some motions that I took under advisement this week. I set briefing schedules so you guys could not waste today's time trying to negotiate them. If there's some problems with the

briefing schedules I set, rather than taking up the time today, just send Carolyn an email saying, "We need more time, less time," whatever it is. On the sanctions motion related to the spoliation, I wanted that briefing schedule to be done before April because I want to be able to ask questions about that at the next oral argument, too. But if you need a week or two extra on that, no worries, but I want to fold that also into the next hearing. I don't think I'll need to have a hearing on whether to add another exhibit to the summary judgment pile, but I would like to be able to ask you questions about the spoliation issues after. That is all I have. So let me turn it over -- it looks like Ms. Miller, Mr. Ho, and Mr. Wallner have No. 1. And I will just say your time is up when you run out of time. Okay?

MS. MILLER: Your Honor, thank you. Britt Miller for CDK. I just wanted to -- before we start the official clock, I wanted to give the Court one framing point, and that is, although CDK is not a defendant in the Authenticom case anymore, it was at the time of the filing of the motions for summary judgment. And as a result, and as instructed by the court, CDK incorporated by reference the applicable arguments from the joint motion for summary judgment as to Authenticom into both its motion for summary judgment as to the Dealers and it's motion for summary judgment as to the AutoLoop. So we will not be repeating those arguments, and Ms. Gulley will be

arguing summary judgment for Reynolds in the Authenticom case, but those arguments will apply to CDK in the Dealers and the AutoLoop case as well.

THE COURT: Okay. Perfect. And efficiency is always good. So if you were just going to repeat what Ms. Gulley said -- and I appreciate only hearing it once, and that's a great way to do it.

Okay. Is there anybody else who wants to put anything on the record before I put you on the clock? All right. Great. Well, again, thank you very much. There's an immense amount of legal talent assembled here on the screen, so thank you. Who's up first? Ms. Miller, are you up first?

MS. MILLER: Yes, sir.

THE COURT: Awesome. Fire away. I'm just going to say it's Docket Entry 773, just so Kris has a reference point.

MS. MILLER: Your Honor, can you see my -- I shared my screen. Can you see my screen share?

THE COURT: Yes, perfect. Thank you.

MS. MILLER: No problem. Your Honor, four months after the close of fact discovery, Authenticom, AutoLoop, and the Dealers, as well as MVSC, collectively disclosed a dramatic shift in their theories of the case. Plaintiffs originally all bought their cases based on the same basic claim, that CDK and Reynolds entered into an agreement in and around January 2015 to exclude Authenticom from their respective DMSs and raise

prices for data integration.

As the evidence shows and will be discussed later on this afternoon, the problem with this theory is that it makes absolutely no sense. Reynolds didn't need CDK's help in 2015 to exclude Authenticom from its DMS. It had successfully secured its system much earlier. And CDK didn't need Reynolds' help in 2015 to exclude hostile integrators from its DMS. It was more than capable of securing its own system.

Faced with these glaring problems as pled, and clearly hoping to bolster their damages claims, plaintiffs came up with a new conspiracy theory, but they failed to disclose it to defendants until well after fact discovery had ended. That kind of tactic is not permissible under the federal rules.

The federal rules require notice pleading. Plaintiffs plead the facts behind their claim so that defendants can answer and defend accordingly. But this doesn't work if a party can fundamentally alter their case after discovery is already complete. This doesn't mean, of course, that a plaintiff can not change his theory as discovery proceeds. But the plaintiff has to inform the defendant of the change while there is still time for the defendant to respond. Certainly, if as here, the change expands, rather than limits, the scope of the case. That's what the Seventh Circuit's decision in *Chaveriat* says, "If the plaintiff in the course of pretrial discovery comes up with a new claim, he will have to get his

complaint amended if the pleadings and the proof are to be conforming." And if this isn't a new theory, why did every court that addressed this case prior to the close of fact discovery, your Honor -- Judge St. Eve, Magistrate Judge Gilbert, and even Judge Petersen in Wisconsin -- understand plaintiffs to be alleging a different conspiracy than the one they now defend on summary judgment. Because that's what their pleadings, briefs and discovery responses said. In response, plaintiffs are relaying on boilerplate in the complaints and pointing to weak and vague references in their discovery responses that discovery was ongoing and may be provided in expert reports. That's not enough under the federal rules.

So how are these theories different? Well, plaintiffs' new theory is not just based on an earlier 2013 start date. It is also significantly broader and more vague. Plaintiffs no longer limit themselves to a supposed agreement between CDK and Reynolds to exclude Authenticom from the marketplace. They can't, because plaintiffs' own experts state that Authenticom's connection across all DMS were going up during this new initial conspiracy period. Moreover, and again according to plaintiffs' experts, CDK didn't raise integration prices at all during the new conspiracy period and Reynolds raised its prices before the start of that alleged new conspiracy period. So whatever CDK was supposedly doing to injure competition from 2013 to 2015 was something other than

raising prices.

Now, plaintiffs will say and have said that there is no prejudice or surprise here because the parties conducted discovery about the events in 2013 and 2014. And, of course they did. That's what you do in a case about a 2015 conspiracy. You take discovery regarding the clean period before the alleged -- the start of the alleged conspiracy to, among other things, analyze what the but-for price would have been absent the conspiracy. What's important here is that discovery was not about the 2013 conspiracy plaintiffs now allege. Defendants selected deponents, sought documents and conducted discovery based on the 2015 conspiracy alleged in the complaints.

Now, none of this is to say that the new conspiracy that plaintiffs are now alleging is persuasive; it's not. And as you will hear this afternoon, we don't think any of it survives summary judgment. But especially in a case of this magnitude, defendants are entitled to know what plaintiffs actually think defendants did wrong before discovery closes and defendants have no ability to test their theory. Plaintiffs cannot survive summary judgment based on alleged conspiracy they didn't even hint at until their opening expert reports.

The Seventh Circuit has said that "A court can and should hold the plaintiff to his original theory, when at the end of the discovery the plaintiff surprises the defendant with

an entirely new characterization of the case." That's the *Vidimos* decision. And, your Honor, that's what we respectfully request the Court to do here.

THE COURT: Okay. You're almost exactly on time. Thank you, Ms. Miller.

So, Mr. Ho and Mr. Wallner, I don't know who's first and who's second, so I'll let you guys fight it out amongst yourselves.

MR. HO: Thank you, Judge Dow. Derek Ho for the individual plaintiffs. I'm going to take three and a half minutes, and Mr. Wallner will follow after that.

Defendants; argument is based on wishful thinking that they've engaged in since the beginning of this case. And that is that our claim is limited to the agreements that CDK and Reynolds executed in February of 2015. In fact, our case has never been limited to those formal agreements. From the beginning, we alleged not only that those agreements were unlawful, but that there was a broader conspiracy not to compete and to exclude Authenticom but other data integrators from the market. Reynolds's Bob Schaefer and CDK's Dan McCray bragged about that broader agreement to Steve Cottrell, and Mr. Cottrell has contemporaneous notes of the McCray conversation. But because McCray and Schaefer didn't say when the broader conspiracy began, our complaints consistently allege that the conspiracy began no later than February 2015,

the date of the formal agreements.

In fact, this Court's motion to dismiss opinions have already held that "The alleged agreements between CDK and Reynolds are not limited to the 2015 agreement (inaudible) and include the broader conspiracy."

Your Honor's Authenticom motion to dismiss opinion called this very argument "a bad argument." And as Ms. Miller now acknowledges, there has been no surprise or no lack of discovery in this case focused on the 2013, 2014 time frame. Data discovery went back to January 2011, documents went back to January 2013. There was extensive deposition testimony about what happened in 2013 and 2014. And, in fact, Judge Gilbert denied defendants' motion to quash subpoenas for telephone records in this time frame because of "potentially relevant conduct going back to 2013."

So let me just talk about what the evidence is that defendants are trying to sweep under the rug. It shows that CDK and Reynolds's conspiracy started in January 2013 and then culminated in the 2015 agreements. I think of it as a three-act play.

In Act One, starting in 2006 Brockman and Reynolds begin blocking dealers' ability to use data integrators. Dealers hate this and CDK bashes Reynolds in the marketplace because of Reynolds's ability -- attempts to close, and that act also prevents Reynolds from fully closing its system.

Act Two is set in August 2013 in Columbus, Ohio. Reynolds has rolled out another wave of blocking, and CDK initially responds in the same way, by punishing Reynolds in the market. But now Reynolds proposes a truce. Bob Schaefer of Reynolds and Howard Gardner of CDK meet in CDK's offices on September 27, 2013. And Reynolds say that if CDK will coordinate its messaging on data access, Reynolds will stop blocking DMI's access to its DMS. And they also propose to give each other software application (inaudible due to poor audio) access to their respective DMSs.

CDK agreed. Overnight CDK halts its competition against Reynolds on the basis of its DMS policies. But they need time to negotiate the exact terms of the guaranteed access, and it's those negotiations that culminate in the February 2015 agreements.

Act Three is the effects of the conspiracy. CDK forces all dealers onto its own integration program. Authenticom's business craters and data integration prices, which were already inflated, skyrocket even further.

In sum, the jury should get to see the entire play, not just Act Three. The federal rules embody a strong preference for merits-based termination of a claim. This is not a fundamentally different claim, contrary to what Ms. Miller said, but simply evidence that the conspiracy that was alleged began not in February '15, and that's not when we

ever said it began, but in fact in 2013. Preclusion of evidence impedes the civil justice system's truth-seeking function and is not warranted here.

THE COURT: Okay. Thanks, Mr. Ho.

Mr. Wallner, over to you, sir.

MR. WALLNER: Good afternoon, your Honor. Robert Wallner for the Dealers. Your Honor, the defendants' claim of prejudice should be rejected by your Honor outright. The defendants in fact extensively questioned witnesses seeking to show, for example, that there never was a conspiracy. Not in 2015, not in 2013, not ever. For example, Mr. Brockman, a critical witness in this case and, until recently, the CEO of Reynolds, was asked by his own lawyer "Have you ever discussed CDK's policies about system access to their DMS with CDK?" He was asked by his counsel "Are you aware of any agreement between anyone at Reynolds and CDK to eliminate third-party data brokers like Authenticom?"

Another example, and these are just examples, your Honor, is Michael Thorne, the former strategy officer of CDK. He was asked by defense counsel if he was aware of "any agreement" between Reynolds and CDK to drive third parties like Authenticom out of business. And, your Honor, listen to what he said. He asked his lawyer, "Time frame?" To which defense counsel said, "At any point?" And moreover they say in their brief that they are prejudiced because they need some

additional discovery about the 2013 state of the marketplace. That's not correct, your Honor. Defendants were extensively examining witnesses about the state of the marketplace in 2013 and way before. Just by way of example again, Mr. Brockman, the head of CEO, was asked by defense counsel "How long have you had those restrictions against the use of third-party data brokers?"

Your Honor, that's not limited to 2015 discovery. Defendants didn't focus on 2013 discovery. They focused on discovery and asked questions that go back, really, to the beginning of time. So, in short, your Honor, the defendants have all of the discovery they possibly could need, and your Honor knows they submitted not a single declaration indicating they needed additional discovery because of any so-called prejudice. For good reason, there is no prejudice, none whatsoever. Thank you, your Honor.

THE COURT: Okay. Thank you, Mr. Wallner. You are all doing quite well on staying close to the time.

Okay. So we're going to move on to the summary judgment motions now. And I think 964 is the first one and it looks like I have Ms. Gulley and Mr. Ho again, right?

MS. GULLEY: Thank you. Yes, it will be better when I'm not muted.

THE COURT: Okay. Ms. Gulley. I just wanted to let you know I can see your exhibit, so fire away.

MS. GULLEY: Great. Thank you. Andi Gulley for Reynolds.

While the briefing is extensive, the core principle is simple. Authenticom has not identified a conspiracy theory that can survive *Matsushita*. Namely, Authenticom has not provided evidence that tends to exclude the possibility that Reynolds and CDK acted independently. Reynolds and CDK develop and license complex enterprise computer systems that support auto dealers and manage real-time interaction of vast quantities of data.

Plaintiff Authenticom is not a software application provider. It's a third-party middleman whose primary complaint here is it is not permitted to infiltrate the computer system to take data and syndicate it to others. We know from *Trinco* and the Seventh Circuit's opinion in this case that Reynolds and CDK have the right independently to refuse to allow Authenticom access to their computer system. A right underscored by other laws like the Computer Fraud and Abuse Act. To skirt the clear implications of this right, Authenticom twists the record to invent a conspiracy to do what either DMS could and did decide to do years apart, secure their systems from hostile access.

There are two core categories of undisputed facts that compel judgment under *Matsushita*. First, Reynolds made the independent decision to prohibit computer system access years

before CDK's copycat decision. Reynolds identified system degradation caused by outside system access and from 2006 to 2013, pre any alleged conspiracy, took measures not only to technologically exclude third-party access to its system but to wind down hostile access industry wide through controlled wind-down procedures.

And when plaintiffs talk about exemptions or white listing, that's what they're talking about, a monitored, temporary wind-down of hostile access. These measures were effective. Authenticom called it an apocalypse for hostile access to Reynolds by 2013. This unilateral control over hostile integration by 2013 makes it implausible that Reynolds would conspire with CDK over such system access. Reynolds had already shut it down.

As to economic incentives, plaintiffs' experts don't dispute that securing the system was profitable absent collusion, and that integration software prices could be raised profitably and unilaterally. Indeed, they cannot dispute that the core Reynolds integration price increase were put in place before any alleged 2013 conspiracy.

Second core set of facts. CDK had independent reasons and ability to secure its system when it followed Reynolds' lead into 2016. CDK identified system infection and corruption from third-party access. CDK's own hostile integration business, called DMI, was also under internal attack with CDK

employees concerned that DMI's then access methods with respect to Reynolds were illegal.

Plaintiffs' experts concede CDK's systems measure could be taken profitably and unilaterally. But even if, as Authenticom suggests, Reynolds and CDK's motives were simply profit driven, not security driven, that makes no difference. The point is that Reynolds and CDK had unilateral motives, not what the motive was. Critically, CDK did not need Reynolds's agreement to secure its system. In fact, the record is clear. Nobody in the industry, not plaintiffs or any defendant, thought there was any chance Reynolds would reverse its system-access policy.

Under black letter anti-trust law, including *Matsushita*, *Clean Products*, *Text Messaging*, and this Court's *Dairy Farmers* case, no matter what spin Authenticom attempts to put on any particular document, its theory cannot survive *Matsushita* in light of the overwhelming evidence that CDK and Reynolds acted alone years apart.

Now Authenticom, as Mr. Ho just mentioned, says its CEO, Steve Cottrell, has direct evidence of conspiracy; that's wrong. The key evidence is Cottrell's own words. Our Exhibits 32 and 306. Reading them is the clearest evidence that they're not an unambiguous admission of an agreement not to compete on system-access policies. Mr. Cottrell admits in his deposition that multiple inferences are required, and that is not enough

under *High Fructose Corn Syrup*.

A final point on *Matsushita*. I encourage the Court to listen to plaintiffs' argument carefully and ask what conspiracy are they talking about. We just heard a new one with the new three points. But following the Seventh Circuit's order in this case, plaintiffs have abandoned the original theory that the written agreements were the conspiracy. Instead, now they have three points, like market messaging, that the parties identified during the negotiation of this same written agreements. Like the written agreements, none of these points relate to Authenticom's core complaint, that it is blocked. These points have nothing do with an agreement to secure the system. And plaintiffs' request that you infer a broad, secret conspiracy from the negotiation of lawful written agreements doesn't fly under *Matsushita*.

Two other key issues in the motion that I would like to hit on in my remaining time. First, Authenticom has not met its burden to show that it has suffered an injury that the anti-trust laws protect. Authenticom's desired hostile system access is barred because it is illegal independent of any agreement between Reynolds and CDK. It's illegal under the law as cited in our counterclaims and prohibited by the dealer contracts that are not challenged here.

Finally, Authenticom's unilateral claims fail. Under *Trinco* Reynolds has the right to refuse system access. Also

Reynolds' vendor contracts are not exclusive. They allow data transfer by dealers. Authenticom has not been foreclosed. Because using dealer transfer methods, it's Reynolds' business is at an all-time high. Finally, plaintiffs admit Reynolds market share is relatively small and declining, and that is not market power sufficient to support these claims.

In conclusion, your Honor, I ask that this Court exercise its critical gatekeeping function as it did in *Dairy Farmers* and find that despite Authenticom's ever-changing theories, the core undisputed facts make it clear that it has not pushed this case over the 50-yard line. Thank you.

THE COURT: Sorry. I muted myself because I was getting all kinds of proposed orders, my apologies. Thank you very much, and you came in under budget. I appreciate it.

Mr. Ho, back to you, sir.

MR. HO: Thank you, Judge Dow. I'm just going to start by reading a few passages from *Areeda* and a couple of cases that I think will make the overarching point, which is that this isn't a *Matsushita* case. And for Ms. Gulley to spend all of her time on *Matsushita*, I think, indicates how weak their summary judgment argument is.

So I will start with *Areeda*. This is Volume 6 of *Areeda*, paragraph 1413(a) at page 92. "In the presence of explicit evidence of an agreement, the presence of an independent reason for acting is irrelevant."

Rossi, which is a Third Circuit case, 1998, cited in Footnote 18 of our brief, "The *Matsushita* standard only applies when plaintiff has failed to put forth direct evidence of conspiracy." *In Re Publication Paper*, Second Circuit, same thing. And that's why the Seventh Circuit in the *High Fructose Corn Syrup* case said two things. One, an admission of the existence of a conspiracy is all the proof that a plaintiff needs. And, two, that unlawful agreements are unlawful even if the parties were "completely unrealistic in supposing they could influence the market price."

So if there is direct evidence of conspiracy, and I will explain why there is, then all the arguments about why the plus factors *under Matsushita* are not met go by the wayside. We think they are met, but this is a category mistake. We have direct evidence of conspiracy. And that evidence isn't limited to the testimony of Steve Cottrell that that's, of course, very Important. Those are admissions that if a jury credits them, would be all of the evidence that the plaintiff needs.

But there is also direct communications between Reynolds and CDK in the documents. Your Honor will recall that in Act One of what I called the three-act play, CDK and Reynolds are in a competitive struggle in the market. Reynolds wants to close its DMS to independent integrators like Authenticom, but CDK is hammering it in the market by aggressively competing for dealers based on the openness of its

system. Just to put a pin in it, this is not different from the conspiracy we allege. This is all about CDK and Reynolds closing its systems to independent integrators like Authenticom.

Bob Brockman testified in his deposition that CDK cost Reynolds more than $300 million in lost revenues by "bad-mouthing" Reynolds's data-access policies 'high and wide in the market.'" That's Docket 1069-16.

CDK's Kevin Witt, "These tactics that Reynolds were using was causing so much discontent in the dealer community that it was driving large and small dealer groups in droves away from their platform and over to ours." That's 1069-26.

And in a colorful work document, Ron Workman of CDK described Reynolds as "getting the crap kicked out of them in the market because of CDK's competition."

Dr. Israel's expert report shows that that was the case. CDK had overtaken Reynolds in the market and Reynolds's market share had dropped from 42 percent to 28 percent. And this competition critically was preventing Reynolds from successfully closing its system from third-party data integrators like Authenticom. To keep major customers from defecting to CDK, Reynolds had to white list log-in credentials used by authorized integrators and exempt them from its blocking measures. We cite that at paragraph 69 to 70 of our statement of undisputed facts, which is Docket 977. So

Reynolds wants CDK, as Brockman puts it, "to stop taking advantage of Reynolds in the marketplace over the issue of data security."

Reynolds's efforts to close are also causing CDK a problem, which is that CDK's integration business is being disrupted by Reynolds's blocking. And so when Reynolds proposes a truce, CDK accepts it. A key piece of evidence, direct evidence of the agreement, is CDK's internal summary of that September 27th, 2013, meeting. This is Docket 1069-199. Again, the meeting was between Bob Schaefer of Reynolds and Howard Gardner of CDK. And it goes through the three points of the deal that I outlined earlier. A critical part of which is that CDK would agree to stop marketing its DMS as superior to Reynolds's because of its openness of the third-party integrators. As Schaefer put it in the meeting to "forage a common perspective with ADP" -- that's CDK -- "on the topic of data-security messaging, to synchronize our security perspectives and speak with similar voices to the industry."

CDK agreed, as I said. As Howard Gardner later put it, "CDK and Reynolds decided that cooperation was preferable to the alternative," which he described as "fighting it out in the DMS world for another two years or more, cooperation was preferable to competition." The effect of the agreement was swift and dramatic. Right after the September 27th meeting, Howard Gardner went back and told his subordinates at CDK that

they were no longer to criticize Reynolds's closed-system policy, because the two companies had "an agreement." When CDK's sales people continued to do so, Reynolds called CDK to complain, and CDK promised to enforce the agreement. We cite all of those communications at 17 to 19 of our summary judgment opposition.

The 2015 agreements were the culmination of CDK and Reynolds's effort to implement aspects of their agreement, namely Points 2 and 3 of the September 27th, 2013, meeting, and that is giving each other's applications reciprocal access to their DMSs and implementing the "soft landing" that Reynolds had promised.

I want to -- I know I'm running out of time, so I want to cite one more document, and that is, right before the February 2015 agreements, Mr. Gardner has a marketing plan for the agreement and those notes say, "We have an agreement. We are locking down our DMS." That's Docket 1089, Plaintiffs' Exhibit 960. So there's direct evidence of agreement. The *Matsushita* factors are really beside the point. That direct evidence is more than sufficient to get to a jury and survive summary judgment. Thank you, your Honor.

THE COURT: All right. Thank you, Mr. Ho and Ms. Gulley. Thank you very much.

So I think the next one we are moving on to is another summary judgment motion, and it's 970. And so we have got

Mr. Scodro for the movant and Ms. Wedgworth for the respondent. So I will turn it over to Mr. Scodro.

MR. SCODRO: Thank you, your Honor, and I hope you're seeing a shared screen.

THE COURT: Not yet.

MR. SCODRO: Okay. It's up there now?

THE COURT: Not for me.

There we go. I got it.

MR. SCODRO: Thank you, your Honor.

THE COURT: Thank you.

MR. SCODRO: Mike Scodro for Mayer Brown on behalf of CDK. Just to briefly summarize our motion for summary judgment on the Dealer complaint, your Honor.

The Dealer plaintiffs are indirect purchasers of integration services. That is, they license the DMS from companies like Reynolds and CDK and purchase apps from software vendors. To the extent those vendors then need to integrate their apps with the DMS, the vendors may pass on some of the associated integration cost to the dealers, but the dealers don't purchase integration directly.

As we explain in our summary judgment motion, the fact that the Dealers are indirect purchasers of integration defeats their damages claim. Meanwhile, their liability claims are basically the same as the conspiracy claims that Ms. Gulley just discussed. And while the Dealers also bring several dozen

state-law claims, these are essentially superfluous from a liability perspective and are plagued by their own individualized legal problems.

Your Honor, I'll begin with damages. As Mr. Glickstein will discuss in connection with the Williams' *Daubert* motion later, the Dealers' damages model is based exclusively on alleged pass-through integration overcharges. The Dealers say these damages are both direct and indirect, but as this Court has already held on the motion to dismiss, such a model is barred by *Illinois Brick*. So what remains of Count One of the dealer complaint following this Court's motion to dismiss ruling should now be dismissed as well.

The Dealers' damages model also treats all of the price increases after September 2013 as conspiracy damages, even though first these include damages for exclusive dealing claims that this Court has already dismissed. And, second, the Dealers' expert himself recognizes that CDK and Reynolds were exercising unilateral market power at the time.

And, finally, it's alone fatal to the Dealers' damages model that it simply doesn't measure named plaintiffs' individual damages. It measures damages for a putative class of nationwide dealers, even though no class has been certified and no nationwide damages claim is viable in light of *Illinois Brick*. Despite repeated requests, none of the named dealers has quantified their individual damages to date.

Turning to liability, your Honor. The dealers bring two basic claims, one for conspiracy under Section One and another for exclusive dealing. And let me start with exclusive dealing because that claim is easy to dispose of. First, it proceeds from a false factual premise. It rests on allegations that CDK added supposed exclusive dealing provisions to its contracts as a result of the conspiracy, while the record shows that these provisions predate 2013.

Second, the claim is abandoned. The dealers don't respond to CDK's factual and anti-trust injury arguments in the Dealers' summary judgment opposition.

Okay. Turning to the alleged Section One conspiracy, your Honor. The dealers allege the same September 2013 conspiracy that other MDL plaintiffs allege -- and the Dealers explicitly incorporate both the background and Section One argument from the Authenticom brief. So the Dealers' case for conspiracy fails at summary judgment for the same reasons that Ms. Gulley just discussed.

But I would like to briefly address the seven so-called plus factors that Mr. Williams says make conspiracy more likely than unilateral action here. As even this brief summary will show, none of his opinions are based on economic analysis, and all of the events he describes are equally, if not more, consistent with unilateral activity.

First, Dr. Williams says that according to his model,

CDK and Reynolds' integration prices were elevated after 2013. But the Seventh Circuit held in *Clean Products* that it's not a Section 1 violation for a firm to raise its price unilaterally. So it couldn't possibly be enough at summary judgment to observe that two large suppliers merely raised their prices.

Dr. Williams also points to record evidence showing that CDK and Reynolds were communicating, sharing information between 2013 and 2015. But of course they were. CDK was trying to wind down DMI's hostile integration business on the Reynolds DMS. And that required CDK and Reynolds to facilitate the wind-down they ultimately agreed to, just as many hostile integrators did during the exact same period.

Dr. Williams also says the February 2015 agreements are themselves evidence of conspiracy. But the Seventh Circuit has held otherwise. And, again, those agreements which mirror similar agreements between app providers and hostile integrators executed during that same period are consistent with independent self-interest.

Dr. Williams next says that CDK and Reynolds' claims that they were promoting security were mere pretext. But that is not even an economic opinion, and Dr. Williams isn't a cybersecurity expert. Moreover, as the Seventh Circuit has held, the fact that a company supposedly acts for pretext is not evidence of a conspiracy. In essence, Dr. Williams opines that CDK simply didn't want to admit to the market that it was

raising prices, a purely unilateral motivation.

Finally, your Honor, Dr. Williams claims that the market here was primed for collusion. But the Seventh Circuit has repeatedly rejected this reason, recognizing that concentrated markets don't just make colluding easier. They make lawful follow-the-leader elevated pricing easier as well.

It also bears noting that this is not the first time Dr. Williams has made these kinds of basic but fundamental mistakes, your Honor. He did the same think in the *Valspar* case where the Third Circuit held that his opinions weren't enough for plaintiff's case to survive summary judgment. There, as here, Dr. Williams' conclusions that conspiracy was more likely than unilateral action were "based on predictions that are insufficient under our case law in analysis that 'mastered the obvious.'"

With my remaining time, your Honor, I'll briefly touch on the state law claims. If the Court agrees that the Dealers haven't joined a conspiracy, then there's no need to address the state law claims the Dealers also bring. But those claims suffer from a number of independent deficiences which we set out in our briefings. We don't have time to go through each of those defects, but I do want to highlight one argument.

The Dealers' revelation for the first time in their summary judgment opposition that they aim to certify a nationwide class under the Illinois Antitrust Act. Now, of

course, that's not how they plead the claim, but in any event the Illinois statute prohibits it. The Illinois Antitrust Act unambiguously bars class action claims by indirect purchasers with the sole exception of the Illinois Attorney General proceeding on behalf of Illinois residents. And under Justice Steven's concurrence in *Shady Grove* -- which, as we explain in the brief, is controlling -- federal courts can't radically transform the Illinois Act by disregarding these express statutory limitations. And while plaintiffs have now moved to add the District of Minnesota's decision in *Pork Antitrust* as supplemental authority, that decision merely adopts the holding of *Broiler Chicken*, which we already addressed in our brief. Judge Shah recognized the point that we're making just a couple of months ago in his *Humira* decision, holding that the Illinois Antitrust Act bars private class actions.

In short and in conclusion, your Honor, the Dealers case, while widely derivative of the Authenticom and AutoLoop suits, also suffers from several independent defects that doom the Dealer complaint at summary judgment.

Thank you, your Honor.

THE COURT: Okay. You guys are fabulous. You are hitting it right on the dot, so thank you.

Okay. So, Ms. Wedgworth, I think you've got the other side of this one, right?

MS. WEDGWORTH: I do, your Honor. Good afternoon.

THE COURT: Good afternoon.

MS. WEDGWORTH: Dealerships' horizontal conspiracy claim, like the Authenticom claim, is possible and supported by direct evidence of defendant's anti-competitive agreement, as well as strong circumstantial evidence and numerous plus factors which further support the conspiracy.

I will briefly address three issues. The decrease in functionality of the Dealer Management Systems, DMS. The second, the damages calculation. And, third, state law claims. As to the decreased functionality in the DMS, dealers are direct purchasers of DMSs and are entitled to damages under federal antitrust law reflecting the DMS's reduced value and functionality. The evidence shows that due to the conspiracy the DMS decreased in functionality, while the price of that same DMS increased.

As stated in the motion to dismiss by your Honor, the Court agrees that plaintiff's horizontal conspiracy claim is at least to some extent based on alleged anti-competitive conduct in the DMS market. As plaintiffs allege that its DMS lost functionality and is worth less as a result of CDK's agreements with Reynolds. Dealers as direct purchasers of DMSs can sue under *Illinois Brick*'s bright-line rule. As confirmed in *Apple versus Pepper*, in 2019 the Supreme Court stated that *Illinois Brick* establishes a bright-line rule that gives direct purchasers the right to sue an antitrust violator. In 2020 the

Seventh Circuit referencing *Apple* stated in *Marion Healthcare*, the relevant inquiry focuses on the relationship between the seller and the purchaser, not the difficulty of assessing the overcharge.

As Story Parchment informs us, "It is enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party." Dealers' expert, Dr. Williams, determined as a result of the conspiracy the directly purchased DMSs lost value and functionality. He demonstrated, and CDK fails to contradict, during this same time period the price of the DMS to Dealers did not decrease but, in fact, increased causing Dealers to sustain damages as DMS direct purchasers.

As a result of the conspiracy, the functionality and value of the DMS was reduced, which caused Dealers to go to vendors and cover by incurring DIS, data-integration fees to purchase integration services. Dr. Williams concluded that the loss is properly measured by the super-competitive increase in DIS fees paid by the Dealers. In other words the increase and DIS fees paid by Dealers is a proxy for damages in the DMS market.

There is no disagreement that the total value of the DMS includes CDK's 3PA program, which is CDK's only approved

method of integration. For example, CDK's VP of Data Services stated in a June 2017 declaration that the 3PA program is not a standalone product. Rather, the 3PA program is considered to be an integral part of the DMS itself.

CDK's own expert, Dr. Whinston, agrees that data integration is part of the total value in using the DMS. And he acknowledges that Dealers' expert, Dr. Williams, holds the same position. And in Dealers' own words, "When we put our CDK contract in place a couple of years ago, we agreed on no integration or connection fees, especially in light of the fact that this is simply an added charge with no product or service to go along with it." And as CDK director of sales acknowledges, CDK's data-access policies directly affect the Dealers' ability to use his DMS for marketing purposes by shutting off its integration with multiple vendors. Dealers' expert, Dr. Michael Williams' damages model permits the jury to make a reasonable and principled estimate of damages. I will address Dr. Williams' damages analysis further in the *Daubert* discussion.

CDK argues that Dealers' expert has not disaggregated damages between acts found to be lawful versus unlawful. The Seventh Circuit approaches antitrust damages differently, stating in *MCI Communications Corp.*, "There is nothing inconsistent between requiring proof that damages were caused by illegal acts and the rule that a plaintiff need not

disaggregate damages among those acts found to be lawful. Here, none of the challenged conduct has been determined to be lawful, and therefore no adjustment to the analysis is needed."

Turning to the state law claims, CDK's arguments are without merit. I will highlight four of them. First, as to the nexus argument, Dealers provide evidence that defendant's conspiratorial conduct had a nexus with the six states at issue. As found in Table A of the Dealers' opposition, the detailed evidence demonstrates key elements of the conspiracy which took place in those states. Hundreds of dealers, including named plaintiffs, acted upon defendant's wrongful acts in those jurisdictions, and yet CDK has ignored this detailed evidence and substantial case law. At the very least, the detailed evidence presents genuine disputed issues of material fact that are inapposite.

Second, with regard to the consumer protection statutes, which cover antitrust behavior, this Court's decision in *Dairy Farmers of America* dictates that CDK effectively concedes New Mexico and Colorado. As to South Dakota and Minnesota, these states' laws extend and cover antitrust violations. As for supplemental authority, we cited *Sandee's Catering versus Agristats*.

And third, the class action bars in Illinois, South Carolina, and Colorado do not apply. Under *Shady Grove*, state class action bars have been found to be inapplicable in federal

class action cases because the state class action bar provisions do not implicate substantive rights. Rule 23 provides the procedural rules that govern class actions. Substantial and recent case law support this conclusion, including our supplemental authority of *In Re Pork Antitrust* litigation.

And finally Dealers satisfied statutory notice requirements. Notice requirements are not enforceable under *Shady Grove* as embraced by the Seventh Circuit in *Sawyer*. As with class action bar provisions, state notice requirements are procedural and thus inapplicable to cases brought in federal court, which does not require pre-filing notice. And most importantly, the states receive notice under the Class Action Fairness Act.

In October 2018 as part of the Dealers' settlement with Reynolds, and only a few months after the operative complaint was filed and prior to the motion to dismiss -- well, decision. As notice was provided and no prejudice to the parties exists, the remedial purpose of the notice provisions has been satisfied; therefore CDK's motion for summary judgment against the Dealers should be denied in its entirety.

THE COURT: Okay. Thank you very much to both counsel on that one. I really appreciate it. It looks like we have one more summary judgment motion before we turn to the counterclaims. And this one we are back to Ms. Miller and

Mr. Ho, right? And this is 967.

MS. MILLER: Correct, your Honor. Can you see my screen?

THE COURT: I just had to unclick my mute button, so, yes, I can see your screen. Thank you.

MS. MILLER: Okay. At the outset I want to briefly touch on Mr. Ho's prior statement that plaintiffs have, quote/unquote, direct evidence of the alleged conspiracy. Under *Omnicare*, direct evidence has to demonstrate an unambiguous conscious commitment to the alleged conspiracy. And the so-called evidence that Mr. Ho cited to you falls well short of that standard.

On the AutoLoop motion, the Vendors claim hundreds of millions of dollars in damages. The vast majority of which is for alleged overcharges on defendant's integration sales. Their damages model achieves this overblown number by attributing 100 percent of defendant's price increases since September 2013 to the alleged conspiracy. But the essential task of an antitrust damages model is to determine how a particular market would have developed in a but-for world holding every other feature of the actual world constant. And it is back letter law that a model used to measure damages caused by an alleged conspiracy must separate the price effects of conclusion from the price effects of the defendant's lawful market power. Vendors' damages theory fails this standard.

It is undisputed as the Vendors' own damages expert, Dr. Israel, makes clear that CDK and Reynolds each had "significant unilateral market power" to raise their prices independent of any conspiracy by adopting a policy of blocking hostile third parties. It is also undisputed that a unilateral decision to block third parties is lawful under the Court's ruling on CDK's motion to dismiss the Vendors Section 2 claims. Finally, it is undisputed that the defendant's unilateral market power could explain their price increases. Dr. Israel found the same damages for AutoLoop's unilateral claims as he does for its conspiracy claims.

In light of these undisputed facts, no rational jury could agree that 100 percent of defendant's price increases during the relevant period are conspiracy damages. The Seventh Circuit's opinion in *Marshfield Clinic* makes this clear. In *Marshfield Clinic*, the plaintiffs also calculated damages at 100 percent of the difference between the defendants' prices and a set of benchmark prices. However, they failed to account for the defendant's undisputed market power to raise prices relevant to the benchmark, warranting summary judgment on the damages claim. The Vendors make that exact same error here.

The Vendors argue that CDK and Reynold's unilateral market power was baked into their pre-conspiracy prices. So it's reasonable to infer that both firms would have left their prices completely flat for six-plus years once the alleged

conspiracy began. Our briefs demonstrate why that argument simply does not hold water.

But of particular note is the fact that Dr. Israel claims that the source of CDK's market power is its ability to profitably implement a policy of blocking independent third-party DIS providers. If that's the case, then it cannot be that CDK's unilateral market power was already fully realized before the alleged conspiracy began, as CDK had not yet begun to block third parties from its DMS at that point. CDK's other arguments on damages are fully detailed in our briefs and I will not repeat them here.

Turning to liability, however, AutoLoop's conspiracy and unilateral claims fail for the same reasons that Authenticom's do. As to its conspiracy claim, AutoLoop also presses a market division Section One theory, claiming that in the 2015 agreements CDK and Reynolds supposedly agreed not to access each others' DMSs. But this Court has already held in the *Cox* case that this theory fails as a matter of law. That's Docket 505 at 12 and 13. And AutoLoop did not even address in its reply our demonstration that AutoLoop abandoned this claim by failing to disclose any expert testimony about it.

As to the unilateral claims, AutoLoop cannot demonstrate antitrust injury on which it bears the burden of proof. There is no antitrust injury if lawful conduct fully accounts for the plaintiff's injury. Here AutoLoop's claimed

injury on its unilateral claims flows from lawful conduct, namely CDK's decision not to deal with hostile integrators.

AutoLoop's only response is to incredibly suggest that if CDK did not have exclusive vendor contracts, it might not have blocked hostile integration. Of course AutoLoop supplies no reason why that would be the case. But more importantly, it cites no evidence that CDK's decision not to permit hostile integration hinged on its exclusive vendor contracts. Summary judgment in CDK's favor is warranted here.

THE COURT: Okay. Thank you, Ms. Miller.

Mr. Ho, back to you.

MR. HO: Thank you, Judge Dow. Two points about liability since Ms. Miller rested and then I'll talk about the damages issues as well.

Point No. 1 on liability. Ms. Miller says that the standard at summary judgment is that direct evidence of conspiracy needs to be unambiguous, and that can't possibly be right at summary judgment. If I could quote your Honor's prior decision in this case, "Even if, as defendants assert, there was some ambiguity in the admissions, they're at minimum highly suggestive of the existence of an agreement to block Authenticom from accessing dealer data and thus out of the market." And just as you credited that at the pleading stage, if a (inaudible due to poor audio) a jury, it could find that "highly suggestive evidence" to be sufficient proof of the

conspiracy, we're entitled to try to convince the jury of that.

As the Seventh Circuit said in *In Re Brand Name Prescription Drugs*, "The interpretation of ambiguous documentary evidence of collusion is for the jury." So the unambiguous standard is just wrong.

Number 2, in the AutoLoop -- in your Honor's AutoLoop motion to dismiss opinion, there's a passage that I also think is relevant to the question of liability. And this is Docket 504 at pages 17 to 18. Again, this was at the pleading stage, but it applies equally at the summary judgment stage. "Accepting CDK's argument that plaintiff only has alleged parallel conduct would require the Court to ignore well-pleaded allegations that CDK executives admitted to the agreement. Such admissions are direct evidence of an illegal conspiracy. The Court therefore rejects defendant's argument that plaintiff has only alleged parallel conduct insufficient to establish the horizontal conspiracy claim." That's our fundamental position with respect to the summary judgment issue on the horizontal claims as well.

With respect to damages, Ms. Miller's argument that there is no evidence is really a *Daubert* argument in disguise, because what I think Ms. Miller really means is that she wants to argue that Dr. Israel's damages analysis didn't reliably account for unilateral market power in a but-for world. Mr. Panner is going to talk a bit more about that in the

context of the Israel *Daubert* motion. But let me just say that the whole point of the analysis that he did, which is known as a difference in differences model led us to account for the but-for world. That is a standard econometric way of dealing with it. And the market power that Ms. Miller alludes to, and that we don't deny that CDK and Reynolds had, the problem with her argument is that CDK and Reynolds had that same market power even before the conspiracy began. And so Dr. Israel's comparison of before and after the conspiracy takes that unilateral market power into account.

Ms. Miller's description of what Dr. Israel said about unilateral market power is also just not accurate. He didn't say that defendants had unilateral power to achieve the same price absent the conspiracy. What he said was that even if CDK and Reynolds' conduct after September 2013 were found to be unlawful unilateral conduct, as opposed to unlawful collusive conduct, his damages opinion would remain the same because the effects of the unlawful conducts would be the same regardless of the legal basis for liability. That's a very different, proposition, and certainly not a concession of the kind that Ms. Miller alludes to.

In short, Dr. Israel did account for the but-for world and other factors that could have influenced integration prices in a but-for world. That's exactly what the DID method is designed to do, and any criticisms of his application of that

method under *Daubert* and Seventh Circuit's jurisprudence are really for the jury and not even for *Daubert* -- not a grounds for exclusion. I'm sorry. Thank you, your Honor.

THE COURT: Thank you to Ms. Miller and to Mr. Ho. So that looks like we have four motions on the counterclaims up next. And the first one, just so I can keep the record straight, is 777. And this is Reynolds's motion, and I've got Mr. Wilkinson and Mr. Ho again. Mr. Ho, you're busy today.

MR. HO: Indeed, your Honor.

MR. WILKINSON: Can everyone see my screen now?

THE COURT: Yes. Thank you. Perfect.

MR. WILKINSON: Great. Thank you, your Honor. So I'll be addressing Reynolds' partial motion for summary judgment on its counterclaims against Authenticom. This is a targeted motion asking the Court to grant an affirmative finding of liability against Authenticom based on two of our counterclaims. These counterclaims are tied to Authenticom's efforts to get into the Reynolds' DMS using automated computer strips. Authenticom's software would log on to the Reynolds' DMS through a remote connection, input log-in credentials obtained from a dealer, answer one or more CAPTCHA prompts, navigate through the system, scrape or extract data, and then log off.

To solve Reynolds CAPTCHAs, Authenticom would use -- excuse me. I'm sorry. To solve Reynolds' CAPTCHAs,

Authenticom used European CAPTCHA farms, such as Death by CAPTCHA. Authenticom's software would feed the Reynolds' prompts to those farms and then inject their answers back into the DMS. Authenticom also used its own software tools to solve Reynolds' CAPTCHA prompts, including one that used memory ripping to obtain the correct answer.

As an additional security measure, Reynolds implemented a suspicious user ID detection program, which would look for and would disable accounts that appeared to be engaged in unauthorized automated activity. Authenticom engaged in an elaborate cat and mouse game to avoid this detection program, including using input spoofing to make it appear as if Authenticom's commands to the DMS were coming from a physical keyboard, and other measures designed to trick the DMS into thinking that Authenticom was a human user.

All of this was done without Reynolds' permission. In fact, it was done over Reynolds' express objections. Authenticom knew it was wrong, too, with employees expressing discomfort about many of the actions it was taking, issuing instructions not to discuss those actions outside the company, and discussing the prison tattoos they were going to get as data pullers.

In short, Authenticom engaged in a years-long campaign of illegal self-help measures, designed to maintain its illegal access to Reynolds' systems and software. Those measures were

in place, and that campaign had been ongoing for several years before the alleged antitrust conspiracy even started.

I'm trying to change the slide here. Let's see if I did it successfully. Nope. Well, apologize for the technical difficulty. There we go.

This motion asked the Court to measure Authenticom's actions against the legal standards of two statutes, the DMCA and the Wisconsin Computer Crime Act. Our DMCA claim is for circumventing technological measures that effectively control access to a copyrighted work.

THE COURT REPORTER: Excuse me. Could you slow down just a bit? I'm having a little trouble keeping up with you.

MR. WILKINSON: Sure.

THE COURT REPORTER: Thank you.

MR. WILKINSON: Our DMCA claim is for circumventing technological measure that effectively control access to a copyrighted work. And our WCCA claim is for willingly, knowingly, and without authorization, accessing computer programs and credentials. The attempt in this slide is to lay out the key facts in exhibits, as well as the key cases. When you measure the technical facts against the law, we believe summary judgment of liability is appropriate.

The key case, as noted at the top of the slide, is actually this Court's order on the CDK's counterclaims against Authenticom, where this Court joined the consensus of

Ticketmaster cases on the applicability of DMCA to CAPTCHA. With respect to the suspicious-user ID evasion, the key case there is the *MDY* case, which is the World of Warcraft case out of the Ninth Circuit. We believe that case is on all fours with Reynolds' suspicious-user ID program and Authenticom's efforts to evade it. Determining the legality of Authenticom's actions has significant ramifications for the antitrust claims in this case, including our illegality defense, as Ms. Gulley previously touched on, and Authenticom's damages model.

Authenticom has a number of defenses up to this motion, many of these will be addressed by my colleague Mr. Patrick as part of Authenticom's own MSJ on Reynold's counterclaims. To preview briefly, there's also what I'll call an expert defense related to Ms. Miracle. I'll address that in the context of our Daubert motion against her. We ask the Court to hold as a matter of law that Authenticom's infiltration of the Reynolds' system was a clear violation of state and federal law. Thank you.

THE COURT: Okay. Thank you very much.

And, I'm sorry that the -- Kris, that the timing is definitely making people want to talk fast, and I promise I won't cut anybody off if they're close and everybody has been at least close. Thank you.

But back to Mr. Ho again. Okay, great. Thank you.

MR. HO: Thank you, Judge Dow. To clarify the

relationship between this motion and the motion that's next up, Docket 976. This is Reynolds's partial summary judgment motion on liability only for its DMCA and WCCA claims. The next motion is Authenticom's motion for summary judgment on all of Reynolds's counterclaims. So there's going to be overlap between my comments on this motion and my argument on the next. But for purposes of this motion, there are five reasons why we think that summary judgment ought to be denied on Reynolds's DMCA and WCCA counterclaims.

Number 1, the DMCA has an illegality defense that bars enforcing conduct that the antitrust laws forbid. That's the Supreme Court decision in Kaiser Steel Corporation against Mullins from 1982. And Authenticom's antitrust claim is that the technological blocking measures that Reynolds is talking about were in furtherance of the unlawful conspiracy with CDK to block Authenticom and other third-party integrators from the market. And so if Authenticom's antitrust claims survive and proceed to trial, Reynolds cannot be entitled to summary judgment. Those counterclaims also have to proceed to trial. And we think that that's the easiest way for the Court to resolve Reynolds's motion for partial summary judgment.

Second, Authenticom's access was authorized by Reynolds under both contract and copyright law. This is an argument that's really primarily an argument why we believe Authenticom is entitled to summary judgment. But even if

it's -- Authenticom is not entitled to summary judgment, there's sufficient ambiguity in the contracts, at the very least, for a jury to find that Authenticom was authorized, as well as the sufficient factual basis for Authenticom to be found to have been dealer's agent, which is what the contract permitted. So if we don't win on summary judgment, we're at least -- it's at least sufficient to defeat Reynolds's motion for summary judgment.

Number 3, there is no nexus to a copyright violation, which is something that the DMCA requires. The DMCA says that it does not affect rights, remedies, limitations, or defenses to copyright infringement, including fair use. That's Section 1201(c)(1). And as a result, if Authenticom has defenses to infringement, then Reynolds cannot prevail on its DMCA claims.

And we think that there are two defenses that warrant trial. One is a fair use defense, under the Seventh Circuit's decision in Assessment Technologies of Wisconsin against Wire Data from 2004, 350 F.3d 640. We think a jury could easily find that Authenticom's use -- I'm sorry, any copyright infringement -- there is no copyright infringement because of fair use. And, second, there's copyright misuse, which is also provided for under the *Wire Data* decision. Here we assert, and there's evidence, that DMS providers are leveraging their DMS monopoly to control data that belongs to the dealers.

Fourth, Reynolds' claims are barred by the statute of

limitations. Acts prior to June 29th, 2015, are time barred. Reynolds says that the counterclaims should relate back to Authenticom's complaint. Even then, acts prior to May 1, 2014, would be time barred. And there's no evidence that Authenticom engaged in violations of the DMCA after that date. With respect to the CAPTCHA that Mr. Wilkinson was talking about, that ended before May 1, 2014; that's Docket Entry 977-167.

The database of CAPTCHA answers that Reynolds talks about, that was phased out in 2012. Something called Menu Walk was disabled by July 3rd of 2013. So if the Court pays careful attention to the dates on which the alleged DMCA violations occurred, I think there's no real dispute that the claims are time barred.

And, finally, there are three additional defenses to DMCA liability that I will touch on very, very briefly. One, Authenticom didn't circumvent technological measures because it actually satisfied those technological measures in their ordinary operation. I will talk more about that in my next motion. The technological measures didn't actually protect any copyrighted works. Authenticom could gain access to the asserted copyrighted works without ever encountering a technological measure, and those technological measures did not effectively control access. So those are three additional reasons -- defenses to DMCA liability that we think foreclose summary judgment.

THE COURT: Okay. Thank you, Mr. Ho.

So it looks like you're now going to go to the flip side and go on the offensive here, and that's for 976. And just a preview of coming attraction, I think we'll do 976, 963, and 949, and then take a 10-minute break just so Kris can stretch her fingers and recover her sanity before she has to type for another hour and a half. So, Mr. Ho, I guess you're up first on 976.

MR. HO: Thank you, your Honor. Let me just pick up on two of the points that I just made in the context of our opposition to Reynolds's summary judgment motion. And those are, one, that Reynolds's counterclaims failed because Authenticom was authorized under Reynolds's DMS contract to use the DMS. And then No. 2 is some specific independent reasons why summary judgment should be granted on Reynolds's DMCA claims, which are the claims that are most significant for purposes of liability.

With respect to authorization under the contract, that question breaks down into three sub-questions. One, did Reynolds's contracts with dealers allow agents to use the DMS? Two, was Authenticom an agent of the dealers? And, three, do each of Reynolds's counterclaims require lack of authorization as the element? And we submit that the answer to all three of those questions is yes and that all of the counterclaims therefore fail.

On the first of the three questions, Reynolds's contracts unambiguously allow dealers and their "agents" to use Reynolds's DMS. And the agreements are at Dockets 977-20 and 977-22. The license says, "You may use the licensed matter for the internal data processing needs of your automotive business. And then there's a list of defined terms. And those defined terms define "you" or "your" as the entity defined in the authorization letter, and all of your employees, agents, and representatives. So we think it's unambiguous that the contracts with the dealers authorize dealers' agents to use the DMS.

Second, Authenticom was the dealer's agent because the Authenticom acted on behalf of the dealer, and subject to the dealer's control; that's classic agency law. We cite a Wisconsin Supreme Court case called *Lang* that sets out that traditional test. And the undisputed evidence here shows that Authenticom was accessing data for the dealer and subject to the dealer's control. The dealer could control Authenticom's credentials, which were revocable at any time. The dealer could control which data Authenticom accessed, down to the field that Authenticom accessed. The dealer could control what third parties Authenticom set the data to, again, down to the field level. And the dealer could control the frequency with which the data was accessed. There's really no material dispute, I don't think, that Authenticom was acting for the

dealers, not for itself or anybody else.

And, third, all of Reynolds's counterclaims require lack of authorization. The slide that Reynolds put up in the last motion actually says "unauthorized" in many of them, but we set out in our brief why as a matter of text and case law all of the counterclaims have, as an element, that Authenticom's access be unauthorized. And because Authenticom's access was, in fact, authorized by Reynolds's contracts with the dealers, all of those claims fail.

With respect to the DMCA, let me just elaborate on those three additional defenses to liability that I concluded the last motion with. One is there was no circumvention of any technological measure, and because circumvention requires that you go around the ordinary operation of that technological measure. So a lock works by requiring you to use a key, picking the lock circumvents it, but using a copy of the key doesn't. And your Honor's decision in the *Navistar* case illustrates that principle. If your Honor recalls, the New Baltimore Garage gave passwords to a third party, who used the password to access Navistar's computer system without Navistar's authorization. And your Honor held that the use of those passwords, even without authorization, didn't constitute circumvention under the DMCA, because it didn't involve descrambling, decrypting, or otherwise avoiding, bypassing, removing, deactivating, or impairing the technological measure,

which is the statutory language.

Applied here, that principle requires summary judgment for Authenticom. The two key technological measures that we're talking about are login prompts and CAPTCHA. With respect to login prompts, using name and password, it's undisputed that Authenticom used dealer-authorized credentials, just like in the *Navistar* case. So that is not circumvention.

And with respect to CAPTCHA, as I'm sure your Honor knows, when you go onto a site and it has a CAPTCHA prompt, the only think that Authenticom is alleged to have done is provided the answers that the CAPTCHA prompt required. That's the equivalent of using the key or using the password, not descrambling or otherwise avoiding the technological measure.

THE COURT: Mr. Ho, you're well into stoppage time.

MR. HO: Okay. Very good. I will just cite one more case on the question of whether the technological measures protected any copyrighted works, and that's the *Lexmark* case. If you can get to the technological work, the copyrighted work, in a different way without going through the access control, *Lexmark* says that the access control doesn't protect that work and that the undisputed evidence shows that that was also true. Thank you, your Honor. Sorry for going over.

THE COURT: No, that's okay. Thank you, Mr. Ho.

Mr. Patrick, I'm going to give you an extra minute. So help yourself.

MR. PATRICK: Thank you, your Honor. I'm going to share my screen here. Do you have my slide? Screen share working?

THE COURT: Sorry. My mute button doesn't work so well, but I do have it. Thank you.

MR. PATRICK: Appreciate it. Justin Patrick for Reynolds and Reynolds. Authenticom's motion for summary judgment should be denied, your Honor. The evidence of Authenticom's illegal hacking into the Reynolds system is simply overwhelming. I'm going to focus on the authorization defense, some key cases under the DMCA and the limitations issue. As to the rest, I will direct the Court to our briefing.

Turning first to the authorization defense. This defense is both meritless and irrelevant. The Reynolds's license strictly prohibits Authenticom's access. You don't have to look any further on this then Authenticom's own pleadings, arguments, and stipulations at every prior phase of this case right up until summary judgment. The license provisions that we identified there on the slide from the master agreement and the customer guide repeatedly and emphatically and unambiguously state that only dealership employees can access the DMS, not other third parties like Authenticom. Those provisions expressly restrict, under the clear text of the license, that first sentence that

Authenticom's entire argument is based on. Authenticom's briefing proposes a lot of different ways to explain these away. Those are wholly unsupported and ultimately boil down to asking the Court to ignore those clear prohibitions.

Furthermore, even if the license did allow access by agents, the facts and law simply aren't there. Authenticom is not an agent. Dealers do not have the right or ability to control Authenticom's performance of its contracts. That is clear under any of the states' laws that any party has proposed; that argument just fails.

Finally, this entire defense is simply irrelevant. For the reasons that are set out in our brief, the license is not a defense to the DMCA claim. Both the Second and Ninth Circuits have so held. They held correctly. For purposes of the CFAA and the common law claims, Reynolds revoked any authorization that Authenticom had in the past through a 2015 cease and desist letter. This Court has already held that that revocation was legally effective.

Turning to the DMCA, your Honor. You've heard about the facts in some detail. What I want to focus on are some key cases. Briefly, I want to address the illegality defense at the outset. That fails both on the facts and the law. It fails on the facts because all of these measures were in place well before any alleged antitrust conspiracy. There's no relationship between them and the conspiracy. It fails on the

law for the reasons set out in our reply brief in support of our affirmative motion.

The three cases I want to focus on here are, first, Docket 506 in this case. There the Court rejected precisely the arguments that Authenticom raises and relies on now regarding the CAPTCHA controls. Every single court that has ever considered this issue, and there are many of them, has held the same. The consensus is unanimous in Reynolds's favor here, your Honor.

Second, the DVD decryption cases, *Corley* and *Reimerdes*. These cases are foundational and influential. They are as close as you can come to canon in the DMCA case law, and they establish that Authenticom's key arguments as to the meaning of the statute are simply meritless. First, they show that there is no authorization confirmation requirement, defeating Authenticom's core argument as to whether the measures were effective or not.

Second, they show that unauthorized use of a real access code or access key is actionable as circumvention, contrary to Mr. Ho's argument a few minutes ago. Indeed, what we show in our brief, your Honor, is that is one of the most common fact patterns from DMCA liability that you're going to find in the cases.

Finally *MDY*, the World of Warcraft case, establishes that defenses to copyright infringement, including fair use and

misuse, are not defenses to the DMCA because there is no infringement-nexus element. Section 1201(c) of the DMCA has no bearing. It does not import a fair use defense to the DMCA. Authenticom's fair use defense also fails on the merits here for the reasons that are discussed in our briefing. The most notable one is *Wire Data* is wholly distinguishable.

Turning finally to limitations, your Honor. Reynolds's counterclaims are compulsory under *Moore vs. New York Cotton Exchange*. Here the key facts for our counterclaims are affirmatively pleaded on the face of Authenticom's complaint. This court has already adopted the majority rule that compulsory counterclaims relate back to the date of the complaint. And we set out in our briefs extensive evidence of post-limitations-date illegal conduct by Authenticom.

Your Honor, the evidence of Authenticom's illegal conduct is simply overwhelming. Authenticom's attempts to excuse its behavior are legally meritless. The motion should be denied. Thank you.

THE COURT: Okay. Thank you to both counsel on 976. We'll do two more before the break. We've got 963, which is the Dealers' motion. And so I think we have Mr. Kupillas for the Dealers and Mr. Fenske for CDK; is that right?

MR. KUPILLAS: Yes, your Honor. Good afternoon.

THE COURT: Okay. Fire away.

MR. KUPILLAS: CDK asserts counterclaims against

Dealers for breach of contract and violations of the DMCA. CDK alleges dealers breached their contracts by handing out their DMS log-in credentials to third parties. CDK isn't seeking actual damages for those claims, only declarative and injunctive relief and nominal damages. But actual damages are a required element of CDK's claims, as the Seventh Circuit's decision in the TAS Distributing case makes clear. CDK offers no evidence of actual damages, nor that they're too difficult to quantify, only that it wasn't worthwhile to have an expert calculate them. Without this required element to its claims, CDK can't obtain any relief.

CDK also doesn't show the potential of irreparable harm that's necessary for injunctive relief. Since CDK claims it's able to successfully disable third-party logins. CDK can prevent any harm. Any injuries from future breaches are compensable through money damages. And CDK's own reports show that third parties are not currently using dealers' logins to access the DMS. CDK also waived its ability to enforce the relevant contract provisions. CDK did not enforce them for years, instead telling dealers they could share logins with third parties. And CDK did not require the specific written notice required to retract its waiver.

CDK asserts DMCA claims against 11 dealerships. But as Mr. Ho explained, CDK can't establish the technological elements of its claims. For example, CDK can't show that its

DMS software and screen displays are protected by copyright. The only evidence CDK offers in support are two declarations from Norton Rodriguez, which should be excluded because he wasn't identified in CDK's Rule 26(a) disclosures or during discovery. Under Rule 37(c)(1) and the Seventh Circuit's *Tribble* decision, those declarations must be automatically excluded.

CDK can't justify its failure to identify Rodriguez. Dealers have been significantly prejudiced, as they were unable to request his documents, take his deposition, or submit expert testimony about his bald assertions. And CDK can't cure the prejudice it has caused by offering his deposition now. And without those declarations, CDK has no evidence that its DMS software or screen displays are protected under copyright law.

CDK also fails to offer evidence of DMCA violations by any individual dealership. Instead, CDK lumps them together into two groups, the three Warrensburg dealerships and the eight Continental dealerships. But such group evidence of collective responsibility is insufficient at summary judgment. And the DMCA statutory damages provision, unlike the Copyright Act, does not provide for joint and several liability. Additionally, your Honor, dealers join in the DMCA nexus argument that Mr. Ho has already addressed.

CDK asserts secondary liability claims under the DMCA against the eight Continental dealerships, based on

Authenticom's alleged circumvention of CDK's CAPTCHA prompts. As to contributory liability, CDK fails to raise a genuine dispute that the Continental dealers knew or should have known that Authenticom would respond to CAPTCHA the way it did. CDK heavily relies on a single email exchange between Authenticom and Continental. But those emails say nothing about how Authenticom would respond to CAPTCHA. And CDK can't identify a single act taken by dealers to contribute to Authenticom's CAPTCHA responses, as is required for contributory liability. For vicarious liability, CDK fails to show that the Continental dealers supervised Authenticom's responses to CAPTCHA or had a direct financial interest in those responses.

CDK also alleges the three Warrensburg dealerships violated the DMCA by allowing Authenticom's Profile Manager software program to restore disabled log-in credentials. CDK's claim that Profile Manager re-enabled 36 Warrensburg logins is based on unreliable expert testimony, as I will address later today. And there were no DMCA violations where Profile Manager merely ran but didn't re-enable any disabled logins, because no CDK access controls were circumvented. In fact, CDK rendered Profile Manager ineffective in April 2017. CDK's claim that a completely ineffective program impaired its access controls shows the absurdity of CDK's arguments.

As to primary liability CDK alleges that Authenticom developed and implemented Profile Manager on hundreds of dealer

networks. Those binding admissions negate any primary liabilities of Warrensburg dealers.

And, finally, as to vicarious liability, CDK fails to offer any evidence that any Warrensburg dealers had a direct financial interest in Profile Manager during the 36 days it ran before being rendered completely ineffective. Thank you, your Honor.

THE COURT: Okay. Thank you very much, Mr. Kupillas.

Mr. Fenske, I guess you're the closer on this one and the closer on the next one, right?

MR. FENSKE: That's correct, your Honor.

THE COURT: Okay.

MR. FENSKE: Let me share my screen. Can you see my screen, your Honor?

THE COURT: I can. Thank you.

MR. FENSKE: All right. Your Honor, on the breech of contract claim, the dealers do not dispute that the jury could conclude that dealers breached their contract by providing log-in credentials to third parties to access the DMS and screen scrape data. Instead, Dealers assert two defenses, waiver and unclean hands, which they accurately abandon in their reply brief, that either fail as a matter of law or are subject to factual disputes that cannot be resolved at summary judgment and described in our briefing.

As to relief, Dealers claim that CDK is entitled to no

relief just because CDK is not seeking money damages on this claim. To be clear, CDK absolutely did suffer monetary harm from the Dealers' conduct. The entire point of Dealers' claims in this case is that the Dealers' vendors supposedly used hostile integrators to obtain data, instead of paying for that data through 3PA.

But recovering that money is not why CDK is pursuing this claim. We simply want to make sure that this conduct stops. The Dealers claim the right to hand out log-in credentials to any third party they wish, even if CDK objects. CDK is entitled to relief making clear the Dealers can no longer do so. The authority I'm referring to, your Honor, is on the slide.

As to the DMCA claim, CDK brings a DMCA claim against two dealership groups, Continental and Warrensburg. You just heard in connection with Reynolds' counterclaims why Authenticom violated the DMCA when invading defendant's security measures. Today I will focus on the evidence of the Continental and Warrensburg dealerships' personal participation in Authenticom's misconduct and will rest on our briefs as to our other arguments.

As to Continental, the jury could easily determine both that Continental had sufficient knowledge of Authenticom's use of automated means to respond to CDK's CAPTCHAs and materially contributed to it two grounds on which Continental

seeks summary judgment. As to knowledge, CDK need only show that Continental should have known or was willfully blind to Authenticom's circumvention. The evidence easily establishes either requirement and is summarized in our statement of additional facts, 94 through 98.

In summary, that evidence centers on the knowledge of the Continental IT director and the person who personally worked with Authenticom to help evade CDK's security measures. As just one example, in September of 2017, Johnson received an email -- that's the ID director, your Honor -- announcing CDK's plan to roll out CAPTCHA prompts. That email said that the entire purpose of the CAPTCHA prompts was to "help prevent automated systems from connecting to the CDK DMS."

Johnson testified that he was certain this would impact Authenticom's pulling scripts and forwarded the email to Authenticom's CEO, who replied, essentially, that CAPTCHA was no big deal because Authenticom had figured out how to deal with it on the Reynolds' DMS for years. Mr. Johnson testified that he did not ask Authenticom how it planned to work around CAPTCHA because he didn't care so long as Authenticom got the data. "So long as Authenticom's program is working and extracting our data," he testified, "I don't stay up at night, you know, wondering how their program is getting the data."

That evidence easily establishes that Continental should have known, because Authenticom uses automated scripts

to pull data and was willfully blind to the fact that Authenticom would use automated means to respond to CDK's CAPTCHAs. That same evidence also shows that Continental materially contributed to Authenticom's violation under the test the Seventh Circuit layed down in the Flava Works decision. Put simply, Authenticom could never have circumvented CDK's CAPTCHAs without Continental's active efforts to supply it with user accounts over CDK's objection.

As to joint and several liability, Continental argues that CDK's claims fail because the Continental dealerships as a whole are not jointly liable. That's wrong legally and factually. The DMCA recognizes joint and several liability. That's the *Stony* decision and other decisions referenced in our brief. And here Mr. Johnson was testifying for and acting on behalf of all of the Continental dealerships.

As to Warrensburg, Warrensburg does not dispute that in March of 2017, Linda Smith, the controller for all three Warrensburg dealerships worked directly with Authenticom to install Authenticom's Profile Manager tool. It does not dispute Profile Manager was an automated computer script designed to re-enable user accounts that CDK disabled. Defendant's Exhibit 485, your Honor, is an email chain showing the Warrensburg controller working with Authenticom to install the Profile Manager script.

Warrensburg, like Authenticom, argues that it's not

joint and severally liable across all three of its dealerships. That's wrong for the reasons laid out in Statement of Fact No. 100. But, regardless, there is evidence in the record from which the jury could tie the violations to a single Warrensburg dealership, Marshall Chrysler. And, again, that's Defendant's Exhibit 485, your Honor. Thank you.

THE COURT: Okay. Thank you, Mr. Fenske. So we have one more. It's AutoLoop's motion on the counterclaims. It' a shorty. And we've got Mr. Panner for the movant and Mr. Fenske, you're back for the respondent. So, Mr. Panner, fire away.

MR. PANNER: Thank you very much, your Honor. Sorry about that confusion with the mute. The basic claim that's at issue here is CDK is claiming that AutoLoop breaches the managed interface agreement between CDK and AutoLoop, which in our views prohibits AutoLoop from retrieving data from CDK's DMS, except through the 3PA integration-service facility. And that's -- the provision that's at issue is Section 1(f), which refers to the fact that AutoLoop is not to otherwise access, retrieve, license, or transfer data from CDK's DMS. There's going to be a dispute about the legal construction of that, but for purposes of summary judgment, we've assumed that there's legal validity to the theory that CDK is pursuing, which is that AutoLoop obtains data from The Auto, which is a company that obtains -- legitimately obtains data from CDK's DMS,

legitimately provides some data from that DMS to certain applications pursuant to permissions from CDK. The argument is that in the provision that's at issue here exceeded that -- that permission.

Now, the basic defense to liability here is that there's no evidence that AutoLoop, in fact, obtained data from The Auto that came from the CDK DMS. There's no dispute that The Auto obtained vehicle inventory data from multiple sources, and so the burden was on CDK to show that AutoLoop in fact received data that originated on CDK's DMS from The Auto, and they failed to do it. They failed to present that evidence in opposition to our motion.

Now, the key dispute is over the testimony of Cox's 30(b)(6) witness, Brian Green. Now he testified squarely that Cox did not share any data that pertains to data originating from CDK's DMS. That's at Docket 1069, Exhibit 48, and it's cited in our reply. And CDK simply never elicited from Mr. Green testimony that supported the claimed breach. And there's -- that testimony that's at issue there is set out in Exhibit 8 to our motion. CDK essentially wants the Court to accept that because The Auto had the technical ability to provide data to AutoLoop, that it should assume that The Auto did, at least in the absence of evidence that that data was somehow excluded from the data that The Auto provided to AutoLoop. But that puts the burden of establishing the claim

on the wrong party. The burden is on CDK, and speculation that The Auto could have provided such data to AutoLoop is not enough. That's the *Zuppardi* case, 779 [sic] F.3d 644.

Now, there's also a basic failure of proof with respect to damages. There's -- at this point, if they are seeking any actual damages, they don't have proof of it, and they're seeking only nominal damages. But the difficulty is that they don't have any evidence of damages at all, and as Mr. Kupillas mentioned -- mentioned in his argument, the *Tas Distributing* case, 491 F.3d 625, establishes or reflects that the rule under Illinois law that in the absence of evidence of actual damage from a breach, there's no claim. It's an element of the cause of action. So that defeats not only damages, but it also defeats the -- their injunction and declaratory claims as well.

Now, the key point here, I think, is that there is simply no requirement under the contract that AutoLoop obtain data from CDK. CDK simply argues that AutoLoop wasn't allowed to obtain CDK's -- data that was on CDK's DMS from CDK. There's no evidence that but for the supposed breach, AutoLoop would have purchased any data from CDK. It could have gotten it elsewhere. And that's the only supposed source of damages. If you look at CDK's brief at 8211, the only basis for damages is supposed lost revenues from AutoLoop. And they abandoned -- they had originally claimed there was (inaudible) damages

associated with monitoring of the system. They've abandoned that claim in response to our motion. And so in short, they're -- the motion for summary judgment should be granted.

THE COURT: Okay. Great. Thank you, Mr. Panner.

Mr. Fenske, you are the last to speak before we take a break, so go ahead, sir.

MR. FENSKE: Wonderful. Thank you. I'm going to share my screen again, your Honor. Will you let me know if you have got it?

THE COURT: Yes. Got it.

MR. FENSKE: Your Honor, a central goal of CDK's 3PA program is to ensure the accuracy, integrity, and security of data maintained in the DMS. Toward that end, CDK required vendors who were certified in the 3PA program to promise not to send or receive DMS data from third parties other than through 3PA. That allowed CDK and dealers to understand who has the data and for what purpose furthering accountability and responsibility for stewardship of the data. In this case a jury could conclude that AutoLoop, whose apps are certified in the 3PA program and who agreed to 3PA's terms, breached its contract when it received inventory data from Cox vendor The Auto outside the 3PA program that originated from the DMS.

It is important to note what AutoLoop does not dispute at summary judgment. It does not dispute, as you heard from Mr. Panner, that its contract prohibits AutoLoop from receiving

any data from the DMS other than through 3PA. It does not dispute that AutoLoop received inventory data -- dealership inventory data from The Auto. And it does not dispute that The Auto obtains inventory data from CDK's DMS. The only question before the Court, therefore, is whether a reasonable jury could conclude that the inventory data that AutoLoop obtained from The Auto contained at least some data originally from the CDK DMS, and the jury plainly can.

The testimony of Cox's Rule 30(b)(6) witness, Mr. Green, is alone enough for the jury to reach this conclusion. Mr. Green testified that The Auto syndicates inventory data, and he defined syndication to mean providing merchandising friendly information, taking it and putting it "into the raw data that's extracted from the DMS." This is AutoLoop Exhibit 8, your Honor, transcripts pages 117 and 122. In Other words, The Auto takes inventory data from CDK's DMS, adds to it information like pictures of cars, and then provides it to third parties. And Mr. Green testified that AutoLoop "receives that merchandised information from The Auto." That is enough to deny summary judgment, your Honor, but there is additional evidence as outlined in Statements of Additional Facts 126 through 128.

As to relief, as with the Dealers, AutoLoop claims that even if it breached its contract, CDK is entitled to no relief because it's not seeking monetary damage. But there is

clear evidence that CDK suffered monetary harm. AutoLoop admits it receives inventory data from multiple dealers from The Auto for which it does not pay CDK, depriving CDK of 3PA fees to which it is entitled. But, again, recovering that money is not what CDK cares about. AutoLoop's breach is ongoing and we want it to stop. And that's why we have brought this claim. Thank you, your Honor.

THE COURT: Okay. Thank you, everybody. Okay. Kris, are you there?

THE COURT REPORTER: I am.

THE COURT: I have got 3:16. Why don't we say 3:30.

THE COURT REPORTER: Okay. Sounds good.

THE COURT: And we have the MVSC, which is two motions. And then we have ten *Daubert* motions, but many of them are two minutes per side. And I think you all can very much assume that I know the *Daubert* standards really well, so just stick to the application and not the law. I know some of you all I've worked on *Daubert* motions with way back in the day and on both sides of the case, so if that helps you stay within the lines, that would be great. So let's start up at 3:30. Thank you so much, everybody. This has really been a huge help, and I'm already thinking about what I'm going to ask you next time around. See you at 3:30. See you then.

(Recess.)

THE COURT: Good to see you again. It looks like our

next two motions are a two-round battle between Mr. Caseria and Mr. Nemelka. So as long as those guys are ready to go. I see Mr. Caseria. And I see Mr. Nemelka. Okay. Excellent.

All right. So we'll start the battle with 954, and then we'll go backwards to 978, and they're both Reynolds' motions with MVC as the opponent, so Mr. Caseria gets the first word and Mr. Nemelke the last.

So, Mr. Caseria, I will turn the microphone over to you.

MR. CASERIA: Thank you, your Honor. And I will just pull up my slides here. Can you see those okay?

THE COURT: I can. Thank you.

MR. CASERIA: Okay. Thank you, your Honor. Here are the high points on Reynolds' motion for summary judgment in the MVSC case. MVSC is a vendor that provides electronic vehicle registration or EVR services. EVR vendors partner with the state's DMV to help dealers issue registration, plates and title on new cars sold at a dealership. MVSC alleges a different and unusual conspiracy.

According to MVSC, Reynolds and CDK and their joint venture CVR, conspired to block MVSC from three different methods of accessing data on Reynolds or CDK DMS. Those three methods are certified integration, manual reporting, and hostile integration. The alleged purpose of this conspiracy was to destroy MVSC and make CVR a monopolist. Now, as

described in our motion at pages 20 to 24, this conspiracy makes no economic sense. In particular, it makes no sense for defendants to conspire to make CVR a monopolist by blocking only one of its competitors, MVSC, and ignoring all others. It's undisputed that at least four other EVR vendors have been admitted to Reynolds' certified RCI program since 2010.

In addition, the undisputed facts show that MVSC itself could have joined Reynolds' certified RCI program at prices comparable to what other EVR vendors paid to Reynolds for the one RCI interface that was actually needed to provide EVR services. That's established by the eight unequivocally undisputed facts at the top of your screen. Three times MVSC asked Reynolds for quotes, and three times Reynolds provided quotes. Three times MVSC made the decision to walk away.

MVSC repeatedly insisted on asking for quotes for interfaces that it concedes it did not need for EVR. MVSC's desire for a special lower price or a special package with more interfaces that it didn't need does not state an actual antitrust claim. And I would direct your attention to the *Klor's* and *De Fillipo* cases we've cited. These unequivocally undisputed facts regarding Reynolds' actions simply cannot be reconciled with the conspiracy allegations by MVSC, regardless of what MVSC's counsel may tell you about documents or what spin they may put on various communications.

With respect to manual reporting, it's undisputed that

manual reporting was the near-exclusive method by which MVSC actually accessed data from the Reynolds' DMS during the relevant period; that's Fact 13. MVSC promoted manual reporting tools to its customers, telling them it was fast, reliable, and secure; that's Fact 12. MVSC also developed its own software tool called Electro that actually works with manual reporting and which it concedes has not been blocked by defendants. That's Fact 20. Perhaps most notably, MVSC's own experts abandoned this aspect of the conspiracy and do not calculate any damages from it.

Now MVSC will probably tell you that manual reporting is not as good as certified integration options such as RCI or that they can't compete effectively with manual reporting. Well, if MVSC wanted to join RCI, all they had to do was pay for it as I've already described. The manual reporting was more than enough for MVSC to compete effectively. In fact, it thrived and succeeded because of manual reporting.

So let's talk about what happened to MVSC in the four state markets at issue. In California, it's undisputed that MVSC went from 36 percent market share in 2014 to over 61 percent market share in 2019, while CVR's decreased; that's Fact 62. This was a period when MVSC was accessing data from Reynolds almost exclusively using manual reporting. MVSC didn't just get by, it dominated.

This type of market-share growth and market-leading

position after years of alleged conspiracy to destroy it is the same type of fact that *the Supreme Court in Matsushita* found to be "strong evidence that the conspiracy does not in fact exist."

In Wisconsin, it's undisputed that MVSC has not been authorized by the state to provide EVR services. In 2013, the state informed MVSC that it rarely accepts new EVR vendors because of massive start-up costs required from the state. MVSC applied anyway, and in 2014 the state rejected its application. In 2017, the state sent a letter to MVSC informing it that the state was closed to new EVR applicants and had been closed and might reopen in 2019. It's undisputed that six other DVR applicants had their applications denied by the state since 2005. With these undisputed facts, 66 to 69 show us is that MVSC would have encountered the same difficulties in Wisconsin regardless of what Reynolds did. The Court in *RSA Media* held that when a state's regulatory scheme is to blame for plaintiff's inability to conduct business, summary judgment should be granted to the defendant.

In Illinois the state imposed a lengthy two-step approval process on MVSC that took years to complete. Reynolds didn't do that. In Virginia there was no harm. The state never expressed any concerns with MVSC's level of integration and it entered the market in 2017 using manual reporting.

I haven't mentioned hostile integration yet, but the

facts are similar to what you've already heard. There was no parallel conduct because there was no conspiracy. MVSC stopped using hostile integration on Reynolds by 2014, but was able to continue using hostile integration on CDK until 2017, three years later.

Your Honor, the undisputed facts I've highlighted today do not tend to exclude the possibility that independent conduct as required by *Matsushita*. To the contrary, they actually exclude the possibility of MVSC's alleged conspiracy.

Finally, even assuming the existence of this conspiracy, it's not plausible that it continued past the date of MVSC's October 2019 settlement with CDK, as MVSC and its damages expert have asserted. Your Honor, at a minimum, dismiss any claims for damages based on an alleged conspiracy continuing after the date of settlement, as the court in *Brand Name Prescription Drugs* did.

And, finally, I'll just note that the settlement itself has not yet been produced. We raised this issue with Judge Gilbert a year ago and he denied our request as premature. In light of the issue I just raised, and also in light of this week's stipulated addition of Reynolds' affirmative defense of setoff, we reiterate our request for an order requiring MVSC to produce the settlement agreement. Thank you, your Honor.

THE COURT: Sorry. On that last point, given the 1300

docket entries, if you want to reiterate the request, please do it in a motion.

MR. CASERIA: Understood, your Honor. Thank you.

THE COURT: Otherwise it may get lost in the thousand pages.

MR. CASERIA: Understood. Thank you.

THE COURT: Okay. Mr. Nemelka, you have the back end of this one and the next one, so go ahead, sir.

MR. NEMELKA: Good afternoon, your Honor. Mike Nemelka here for MVSC. Thank you for holding these hearings. As a matter of how these motions fit together, the core antitrust conspiracy that has been discussed already is also at issue in MVSC's case. And so MVSC's case will go forward with the denial of summary judgment on that conspiracy claim common to the MDL.

So I'll turn my attention to the conspiracy that is unique to MVSC, the group boycott by CDK and Reynolds to exclude MVSC from their 3PA and RCI programs. To complete its work, MVSC needs certain information from a dealer's DMS, like who bought the car and the VIN number. So in 2014, and then repeatedly thereafter, MVSC applied to CDK and Reynolds to participate in their data-integration programs.

Now, it's important to remember that CDK and Reynolds jointly own MVSC -- MVSC's main competitor, CVR. CDK owns 80 percent and Reynolds owns 20 percent. It's a cash cow for

them. But it is widely recognized that MVSC has the much superior product and service, and that's in the record, and is a threat to CVR in its main markets: California, Illinois, Virginia, and Wisconsin. And I will just point the Court to Docket 1069, Exhibit 256, where CVR says -- this is from 2015 -- wrote "Our biggest competitor, DMVdesk," which is MVSC's product, "will be going live in mid-2015 in Illinois, and we absolutely cannot allow them to get a foothold."

So when MVSC applied to participate in their data integration programs, CDK and Reynolds conspired to boycott MVSC. There's no dispute on the legal question. Group boycotts like this are, per se, illegal. The only question, then, is a factual one. And on that, our summary judgment papers cite a host of evidence. Today I would like to highlight just one particular document, which I think Mr. Caseria alluded to, and it requires no interpretation from me. So I'm going to share my screen and pull that up.

THE COURT: I'm going to stop you for one second. There's someone who's not muted on the phone, and it's creating a little back because it keeps flipping back and forth between you and that number. There's no name, but it's someone with the area code 608. So if you could please mute, that would be very helpful for our court reporter.

And I can see your screen, so fire away.

MR. NEMELKA: Thank you, Judge Dow. I appreciate

that. This is an email from November 30, 2015, as MVSC is applying to these programs from Reynolds and CDK. And it's an email from Scott Herbers -- he's at CDK, and he was the CDK executive in charge of CVR for CDK -- to Jonathan Strawsburg, who was the Reynolds' executive in charge of the MVSC Company. And Jon Strawsburg, if you go below, had asked Herbers, "What should I tell a dealer about MVSC and its competition with CVR?" And so here's what CDK tells Reynolds, and I'm reading the quoted part. "DMVdesk," which, again, is MVSC's product, "does not and will not have direct DMS integration with Reynolds." Direct integration is the RCI program. It goes on, "The data that DMVdesk will never have access to through Reynolds." This is CDK telling Reynolds that MVSC will never have access through the RCI program. These are the two executives at CDK and Reynolds talking about MVSC's access to their programs, and saying that MVSC would never have it.

I am going to go back. And Reynolds listened to CDK. I point your Honor to Docket 1069, Exhibit 130. That is a document from March 2016, months, months later, and it's a Reynolds marketing plan for CVR, and it says the same thing. MVSC has never and would never have direct DMS integration through RCI. If there is ever evidence of a group boycott, then this is it. Both parties talking to each other about never letting MVSC in. In fact, it's CDK telling Reynolds that Reynolds would never let MVSC in.

Given this evidence, and of CDK's and Reynolds's broad collusion of data access generally, a reasonable jury could infer that MVSC's failure to gain access to 3PA and RCI was a product of defendant's agreement. CDK and Reynolds carried out their boycott by denying or effectively denying MVSC's membership in their programs. CDK, for its part, just flatly told MVC no. "You compete with CVR, you're not getting in." Or they quoted an absurdly high percentage of MVC's top-line revenue. CDK actually called CVR's services a "closed category." It wouldn't let any anybody in who competed with CVR.

Reynolds, like CDK, quoted MVC a monthly integration fee that would require MVC to operate at a loss on every transaction in California, Illinois, and elsewhere. There's unrefuted evidence from MVSC that it could not operate as a business and pay those prices. Plus, demonstrating the charade of those price quotes, they came in 2014, before the communications that we just looked at, where Reynolds and CDK confirmed that MVSC would never be able to participate in RCI.

Mr. Caserio referred to the manual workarounds that MVSC developed to operate as a business. Now they stopped MVSC from joining 3PA and RCI, so it couldn't get data directly. MVSC couldn't get data from integrators because they agreed to block those, too. So MVSC as a scrappy, innovative company did develop some imperfect workarounds to get the data. It

requires manual intervention by the dealer; it's not perfect. But the MVSC needed to do that in order to operate its business, and because of its superior product and services, some dealers were willing to live with that.

A final statement on the importance of this case with respect to MVSC. It's a great example of the harm that comes in a digital economy like we have now, where data is the oil that powers the engine. And CDK and Reynolds are the two companies that conspired to restrict access to that data to the harm of vendors and the whole industry. Thank you.

THE COURT: Okay. Thank you, Mr. Nemelka. I think now we are on to the motion to bar. Same two combatants, so, Mr. Caseria, you get your two and a half minutes right now.

MR. CASERIA: I will pull up my slides here. Okay. Thank you, your Honor. For the first two years of this case, MVC's claims were based on the California and Illinois DVR markets. In August 2019, four months after the close of fact discovery, we received the damages report of MVSC's expert, Gordon Klein, and discovered that MVSC had expanded its claims to include Wisconsin and Virginia, more than doubling the amount of the potential damages.

MVSC cannot amend its claims by expert report. That's established by Rule 15(a) and the *Chaveriat*, *Paramount* cases that we've cited. Now MVSC says the Wisconsin and Virginia claims were always part of this case. But MVSC's second

amended initial disclosures at Exhibit B, which were served in April 2019 at the close of fact discovery don't mention Wisconsin or Virginia at all. They identify witnesses with knowledge of the California and Illinois EVR markets but not a single witness with the knowledge of Wisconsin or Virginia.

Similarly, MVSC never mentioned Wisconsin or Virginia in its Amended Response to Defendant's Interrogatory No. 27 at Exhibit C, which is served in January 2019. That interrogatory asks MVSC to describe how competition had been harmed separately for each market at issue in its causes of action. MVSC simply referred back to its complaint. But if you look at the complaint, particularly paragraph 64 and 206 to 263, the only relevant markets at issue are California and Illinois.

Now all of this is highly prejudicial to Reynolds. We lost the opportunity to ask for documents from depositions from key individuals, such as Don McNamara, MVSC's general manager in Virginia; or Kelly Medick, MVSC's general manager in Wisconsin. Neither of whom was identified in MVSC's initial disclosures. We can't ask them fundamental questions about MVSC's efforts to enter those state markets or differences in competition in those states.

Three days after we received Klein's report, we sent FOIA requests to both states asking for documents. But FOIA is not a substitute for full discovery in litigation. Trying to redo all of that discovery now to fully explore the issues in

Wisconsin and Virginia is not feasible due to the substantial time and expense that would be required, as the courts in *Oracle* and *City of New York* found.

Now MVSC will say this is all about the amount of damages and it's not required to be specific about the amount of damages early on in the case. But this is about a lot more than that. It's about relevant markets, which are a critical and unique issue in any antitrust case. Take a look at the *City of New York* case that we've cited, where the Second Circuit refused to allow the plaintiff to expand its case after the close of fact discovery to include two newly defined relevant markets due to the delay and substantial additional expense that would result. Thank you, your Honor.

THE COURT: Thank you, Mr. Caseria. Mr. Nemelka.

MR. NEMELKA: Thank you, your Honor. And just to be clear, the document that we went over previously, that's Docket 1069, Exhibit 130. And then the following on Reynolds' internal marketing is Exhibit 131. I don't know if I said that. Thank you.

THE COURT: Great. Thank you.

MR. NEMELKA: On this motion MVSC provided more than sufficient notice of its Virginia and Wisconsin damages under the "short and plain statement standard of Rule 8." In its complaint, MVSC identified the specific markets, Virginia and Wisconsin, at issue. I point the Court to paragraph 86. "MVSC

plans to enter other EVR markets, including Wisconsin and Virginia. But so long as CDK and Reynolds deny MVSC access to the dealer data stored in their DMS platforms, it will be very difficult, if not impossible, for MVSC to compete in those markets."

The complaint also identifies the purpose of the conspiracy was to harm MVSC in markets it would try to enter in the future, again like Virginia and Wisconsin. I point your Honor to paragraph 107 of our complaint. MVSC's complaint does much more than what Rule 8 requires. Given this notice during discovery, CDK and Reynolds propounded a document request, served interrogatories, and conducted depositions on Virginia and Wisconsin. Defendants themselves confirm in written discovery correspondence that Virginia and Wisconsin EVR markets were properly part of MVSC's claims. And those letters, your Honor, are marked in Appendix A of our opposition.

And just one example that I would like to cite for the Court. Counsel for CDK wrote to us, MVSC, saying "We are willing to produce non-privileged responsive documents for the Wisconsin and Virginia markets in which CVR operates and MVSC, according to paragraph 86 of the operative complaint, is alleging to gain approval." This admission completely undermines defendant's argument that they didn't have notice or that Reynolds didn't have notice now that CDK is out of the

case.

In its opening motion, Reynolds did argue that MVSC's claims for damages in Virginia were a de facto request to amend the complaint. But, of course, the authorities Reynolds relies on state that it has to be an entirely new claim or new factual basis, which is not at issue here. The claim remains the same, group boycott. The factual basis remains the same. It has suffered lost profits in the state markets, including Virginia and Wisconsin.

And so on reply, Reynolds pivots, as Mr. Caseria did here, to saying that it was not a damages issue, instead it's about the markets. But, again, as we've just identified, MVSC actually identified those specific EVR markets in its complaint, and explained how EVR markets are unique markets. And there's just no prejudice here even if there was lack of notice, given the discovery that Reynolds got. Thank you, your Honor.

THE COURT: Thank you to both counsel.

Ten down, ten to go. And we're on to *Daubert*. So with the first *Daubert* motion, I'm just going to say this for the record, is 877. And Mr. Provance and Mr. Panner are dueling out this one. Mr. Provance is representing the movants, so fire away. And I can see your screen, too, so thank you.

MR. PROVANCE: Excellent. Thank you, your Honor.

Defendants moved to exclude several opinions offered by plaintiffs' liability and damages expert, Dr. Mark Israel. First, with respect to liability, Dr. Israel reframes the alleged conspiracy to be about openness. A term that he's used to mean generally the ability of vendors and dealers to use third-party integrators. Dr. Israel infers a reduction in defendants' openness during the so-called initial conspiracy period from all sorts of things, including statements to customers, pricing and competition. But he ignores the most direct evidence of defendants' openness, which is how much third-party integration was actually permitted on their systems.

By Dr. Israel's own calculations, Authenticom's connections on defendants' DMSs went up during the initial conspiracy period, not down. Dr. Israel testified that defendants' openness is not "tested in any way by this data." His answer shows that the openness concept can't be tested or disproven, even with directly contrary evidence.

Beyond that, Dr. Israel's conclusion that defendants' comment was more consistent with conspiracy is unreliable. It's undermined first by his own assessment of plaintiff's unilateral conduct claims. In that section of his report he says that CDK and Reynolds have "significant unilateral market power in the DMS market, which allows each of them to profitably raise their integration prices by blocking

unauthorized third parties." Now if there are any questions about what Dr. Israel is actually saying, the Court can refer and review on its own paragraphs 208 through 11 of Dr. Israel's opening report, which is Exhibit 1 to our motion. He's saying that securing the DMS would be independently profitable for each without a conspiracy.

Dr. Israel uses circular reasoning in an attempt to avoid this contradiction. He says that while it might have been profitable for each defendant to do what it did independently, it was more profitable for them to conspire. But when pressed to explain this, he said, "Well, we know they conspired, so they must have found it profitable." He is assuming the conspiracy and working backwards. What this and other evidence shows is that Dr. Israel's conspiracy opinions are guided by a commitment to plaintiffs' theory, not an independent analysis of the economic evidence.

Moving on, Dr. Israel's analysis of Reynolds' prices is flawed because he used average revenue per customer, instead of the prices for each product. Those prices were available to Dr. Israel, he just decided not to use them. As a result, his data observes customers shifting to more expensive integration packages during the period, which is a change in product mix, and calls them price increases. In our Exhibit 104, which is at Docket Entry 1034-7, you see this very clearly for AutoLoop, the putative class representative. Average revenue for

AutoLoop increases significantly between 2015 and 2016. But if you examine AutoLoop's actual prices, they didn't change at all.

Next, Dr. Israel's damages model itself is unreliable. On the conspiracy claims, he attributes all of defendants' price increases to the alleged conspiracy. That's explained at pages 267 through -68 of his deposition, which is attached to our motion at Docket 889-3. Thus, his model assumes that defendants' admitted unilateral market power would have resulted in no significant price increases for the entire conspiracy damages period, which is 6-plus years and counting. This is both a *Daubert* and a summary judgment problem. In *Marshfield Clinic*, which is a summary judgment case, the Seventh Circuit found that a conspiracy damages module with similar flaws was "worthless." That's 152 F.3d F 593.

Dr. Israel also contends that damages for AutoLoop's nonconspiracy claims are exactly the same as the damages for the conspiracy claims. That's impossible because the specific conduct at issue on the nonconspiracy claims is different. It's not CDK's blocking generally, it's the alleged exclusive dealing provisions in CDK's contracts. Dr. Israel did not attempt to isolate and measure price effects, if any, specific to exclusive dealing.

Dr. Israel defined the data integration services market both too broadly and too narrowly. He defined the

market too broadly because he includes both simple data extraction services and complex integration services. And he also defined the market too narrowly by excluding third-party integration services that use dealer reporting tools, which neither defendant prohibits. Authenticom, in fact, has used those tools to grow its connections on the Reynolds' DMS to an all-time high.

These issues also impact Dr. Israel's pricing analysis. He attribute differences in pricing behavior between defendants and Authenticom to the alleged conspiracy. They are offering mostly fundamentally different services, which aren't good substitutes, and so there's no reason to think that the price trends should be the same to begin with.

Finally, in the MVSC case, Reynolds also moves to exclude certain of Dr. Israel's opinions that are relevant to that case, and on that issue, I would simply refer the Court to our briefs. Thank you.

THE COURT: Okay. Thank you. I appreciate it.

Let's see. Mr. Panner, you've got the other side of this one, right?

MR. PANNER: I do. Thank you, your Honor.

THE COURT: Okay.

MR. PANNER: Your Honor, as Mr. Provance indicated, they've raised a number of issues with respect to Dr. Israel's (inaudible due to poor audio) a number of the issues that they

raised in their motion. So let me try to address in order of what Mr. Provance referred to and then try to cover some other issues that your Honor will see and review in the briefing.

Now, the first opinion, there's -- I'm not exactly sure what the *Daubert* basis was. In the original motion that they filed, they argued that Dr. Israel's opinion about the conspiracy was vague. That is clearly not true and I would note that Mr. Provance has misstated what the nature of the conspiracy is. He suggested the conspiracy was to reduce openness. That's not correct, and if he had read -- you can see from the defendants' own experts' reports, the nature of the conspiracy is not to compete on the dimension of openness. It's a -- that is to say, on that product quality.

Now, Dr. Israel explains that DMS providers before 2013, before September 2013, competed on openness, and during that time CDK gained substantial share. That will sound familiar from Mr. Ho's argument. But that starting in September 2013, CDK stopped competing on that basis in the DMS market. So this is a DMS-market conspiracy, which then is formalized in February 2015. They had a shared goal of eliminating independent data integrators and they cooperated in doing so. And that's reflected in the common market messaging that the parties agreed to in September 2013.

Now, as I noted, opposing experts had no difficulty responding to the opinions. For example, Dr. Bresnahan, Docket

889-17, referred to an agreement to cease competition in a nonprice product characteristic, which is most important. There's an argument that Dr. Israel somehow failed to exclude unilateral conduct or didn't show that the proximate -- that the conduct was a product of conspiracy, but this again goes back to something else that Mr. Ho argued earlier, which is this is not a case in which there's parallel conduct and we're seeking an inference of conspiracy. There's evidence of agreement and Dr. Israel is providing an economic interpretation of the nature of that agreement, how it affected competition, how it caused harm to consumers in the markets at issue here, in addition to providing necessary antitrust economic expertise with regard to issues of market definition, et cetera.

And he showed how the nature of the reduced competition was analogous to -- essentially analogous to price fixing. How the parties understood that the alternative to cooperation with regard to aligning market messaging, agreeing to close the DMSs, was to fight it out in the DMS world.

Now, he also showed that there was economic evidence that CDK's unilaterally optimal strategy before 2013 was to compete on openness, and that they agreed to stop based on Reynolds' actions.

And CDK's own expert, Dr. Whinston, again reflected that -- the nature of the agreement quite well in his

testimony. He said, "Reynolds backed off blocking DMI, and CDK stopped badmouthing Reynolds." That's Docket 875 at 45. And as Dr. Bresnahan noted, the badmouthing was really what competition here was all about in the competition of the DMS market.

And Dr. Israel also explained the additional ways in which collusion was advantageous to the conspirators. Reynolds -- and this is important -- Reynolds couldn't exclude independent integrators successfully without CDK's help because of the competitive pressure that it faced from CDK, and that's discussed in Israel's reply report, paragraph 114, and in his opening report at paragraphs 129 to -30 and 134. And CDK also had assurances that it would continue to have access to Reynolds' dealers data for its own apps, and that Reynolds would not flip strategies that it could do in the absence of an agreement.

And -- so the notion that there's any sort of circulatory here is not correct. He was relying on the evidence as an industrial organization economist -- antitrust economist to explain the nature of the conspiracy and its impact.

Now, with regard to the damages analysis, there is an argument of -- you heard the argument about composition effects. This is a classic battle of the experts. It's not correct that -- essentially, what Dr. Israel did, as he

explained, is he tracked changes in prices at an application level. What he did is he looked at each company and saw how the changes -- their changes in the amount that they paid for integration services changed over time. He used a regression to isolate the change due to the conspiracy from changes that were due to other factors. That's a very common method. The difference-in-difference approach that Mr. Ho referred to before.

Now, the argument that he lumped together, that he failed to distinguish changes in product mix is not correct. He has addressed that. He did, in fact, look at application-by-application prices where he could. In some cases -- and AutoLoop was an example -- he didn't have that data. But what he did is he did a check, and there was no reason to think that that was necessary significant. It was challenged in the reports, and in his reply report he explained it didn't make a difference. He used a check called a fixed-weight pricing index to show that the changes were correlated.

Now, again, this is getting down in the weeds. It's not the sort of thing that can be resolved in a *Daubert* issue. It's a question for the jury and cross-examination. But, although CDK argues that that method did not adequately address the problem, in fact, it did, because this is about damages. And, you know, under the law and a good estimate for the

damages is all that is required. He confirmed the violation by showing that prices increased and the fixed-weight price index confirms that.

Very quickly, the DIS market definition, there's no merit to the argument that he didn't apply appropriate methodology, and they admit that there was evidence to support the conclusion both that dynamic reporting and manual method is not in the market because of its deficiencies. And the argument that the market is too broad because it involves both read-only and more complex integration services ignores the fact that he considered that problem and showed that blocking of read-only services resulted in an increased price for complex-integration services, which confirmed his market opinion.

And then, as your Honor will see in reviewing the briefing, the argument that -- with respect to the MVSC case, is they are seeking exclusion of an opinion that Dr. Israel doesn't, in fact, offer.

With that, your Honor, I may have gone a little bit over for which I apologize, and I will yield the floor.

THE COURT: Great. Thank you so much, Mr. Panner. I appreciate it.

So the next motion is 881. This is Williams, who we heard about earlier today. And I think Mr. Glickstein has the affirmative case and Ms. Wedgworth has the defense, right? So,

Mr. Glickstein, you're up.

MR. GLICKSTEIN: That is correct, your Honor. Just give me one moment. Is that displaying?

THE COURT: Yes. Got you. Thank you.

MR. GLICKSTEIN: Thank you, your Honor. We challenge both the liability and damages opinions that are offered by the Dealers' economic expert, Dr. Michael Williams. Dr. Williams' liability opinion should be excluded because he didn't apply a reliable methodology to conclude that CDK and Reynolds reached an illegal agreement in 2013 or ever. In fact, he really didn't conduct an economic analysis of liability at all. He simply read documents that were given to him and asserted conclusions. The easiest way to see this is just to read Dr. Williams' report. So I won't discuss those arguments in detail here. And the Court will also see similar issues in the summary judgment motion that Mr. Scodro discussed earlier today.

Here I'm going to focus on two flaws in Dr. Williams' damages opinion. The first is his opinion on direct damages, which should be excluded because it's contrary to law. Now, the Court has already held that at the motion to dismiss stage that with respect to the Dealers' federal claims, the Dealers cannot recover integration overcharges passed through by the vendors. That's Docket 507 at 21.

In paragraph 171 of his report, Dr. Williams opines

that the conspiracy has resulted in about $340 million in pass-through overcharges. And he calculates this number by taking overcharges from the DMS providers to the vendors, and then multiplying that number by an estimated pass-through rate to the Dealers. In the same paragraph of his report, Dr. Williams then claims that the exact same damages, calculated using the exact same overcharge methodology, are direct damages. And his justification for this is that the overcharges can be viewed as what he says result from the decreased functionality of defendants' DMS systems. I think Ms. Wedgworth earlier today said it was a proxy for damages.

But this is wordplay. The law does not permit an expert to take overcharged damages passed through down the chain of distribution and call them by another name to evade *Illinois Brick*. That's exactly what the Seventh Circuit held in the *Brand Name* case cited in the briefing. We think that's the principal and decisive authority on this point. Plaintiffs can prove damages however they'd like, so long as they don't seek to use the very incidence analysis of overcharges, indirect overcharges, that *Illinois Brick* bars.

Ms. Wedgworth responded on the summary judgment motion, and may say again here, that the Court's motion to dismiss allowed the Dealers to try to recover direct damages on the federal claims were harms in the DMS market. But the Dealers need proof of such harms, and as I just explained,

Dr. Williams didn't try to measure those harms at all. He just has one model, which is an indirect overcharge model.

The second flaw in Dr. Williams' opinion, damages opinion, is that it fails to control for CDK's and Reynolds' unilateral power. This is an issue that's come up a lot today. It's in the AutoLoop brief and the Israel *Daubert* motion that was just discussed. Under the principles articulating all of that briefing, a plaintiff has to separate the price effects of collusion from the price effects of the defendants' lawful market power. And for two reasons, Dr. Williams failed to reliably do so.

First, Dr. Williams' price analysis, by his own admission, includes unilateral price effects. As we explain in the briefs, Dr. Williams repeatedly stated in his report that CDK and Reynolds had the ability to, and did, raise integration prices at least in part through unilateral exercise of market power. And having recognized that CDK and Reynolds had this power and used it to raise price in the conspiracy period, Dr. Williams could not simply assign all of the price increases he measured to a conspiracy.

The second problem with Dr. Williams' opinion is that he tries to rely on his difference-in-differences model to control for unilateral powers, a similar move to Dr. Israel. But that model is actually a reason why his opinion is unreliable. Dr. Williams admits, and you can see it on the top

of the slide, that the key assumption of a difference-in-differences model is that prices in the preconspiracy period move in parallel. That parallel pads assumption is what Dr. Williams uses to conclude that defendants' pricing when it changes after the start of the supposed conspiracy is caused by the conspiracy, as opposed to nonconspiratorial factors. But Dr. Williams has no reliable basis for finding that the parallel paths' assumption holds.

He said at his deposition he didn't do a statistical analysis. He simply eyeballed the data to see if it looked parallel. *But Daubert* Requires more than eyeballing. Expert opinions have to have a testable scientific basis and Dr. Williams admitted he didn't have one.

Daubert certainly requires more than eyeballing here because if you look at the chart, you can see that the pre-period is not parallel. I have highlighted in yellow on the left side of the slide, the portion of the period from January to September 2013, and blown that up on the right of the slide. You can see that Reynolds' prices are going up during this period. Authenticom prices go down. And CDK's and SIS prices remain flat. So there's no remotely reliable basis for concluding that prices in the pre-conspiracy period were parallel, and that means the entire model should be excluded. Thank you.

THE COURT: Okay. Thank you. Appreciate it.

Ms. Wedgworth, I think you're up next, right?

MS. WEDGWORTH: Yes, your Honor. Thank you.

THE COURT: Thank you.

MS. WEDGWORTH: Hopefully I can zero in on some of this. There is no basis, your Honor, to exclude Dr. Williams' opinions. And I'll start with Dr. Williams has two primary conclusions in his liability analysis. The first is CDK's closure of its DMS to independent integration and increase of 3PA prices were not consistent with unilateral behavior. They were instead the result of an unlawful agreement with Reynolds to stop competing on DMS openness. Without that agreement, CDK would not have closed its DMS and could not have successfully raised 3PA prices.

Second, CDK's 3PA price increases during the damages period were not unilateral but were entirely dependent on the conspiracy with Reynolds. CDK internally admitted that its ability to raise 3PA prices in the 2015-16 time period was dependent on successfully closing its DMS. Otherwise, many vendors would choose to move to a hostile provider rather than pay CDK's price increase. There is direct evidence of a per se illegal agreement to drive Authenticom out of business, which is complimented by plus factor evidence analyzed by Dr. Williams. Not only did he analyze the data of defendants and vendors, he also examined plus factors, which courts, including this circuit, routinely use in antitrust cases in

evaluating market conditions and defendant's conduct. The presence or absence of conduct constituting the conspiracy can be evaluated by examining inferences that may be fairly drawn from the behavior of the alleged conspirators.

I highlight two plus factors Dr. Williams considered, which Mr. Scodro also addressed. The first one, actual prices exceed but-for prices, this is a well-recognized plus factor as it is evidence of actions or conduct that could occur in the presence of a collusive agreement, but that are highly unlikely to occur in its absence. Dr. Williams concluded that defendant's actual integration services prices during the damages period exceeded the prices that defendants would have charged but for the alleged conspiracy.

Plus Factor 2, defendant's communications at high levels. Dr. Williams concluded CDK and Reynolds exchanged certain types of information that would not be in their self-interest to exchange but for the conspiracy here. For example, in 2013 a Reynolds executive told a CDK executive that Reynolds would not be targeting CDK's hostile integration but would be targeting other competitors. Dr. Williams opines that Reynolds had no unilateral incentive to provide that information to CDK in the absence of an agreement to jointly drive independent integrators from the integration services markets.

Coke and Pepsi, who compete vigorously, would not

exchange this type of confidential information. And while CDK criticizes each plus factor in isolation as they have done today for purposes of summary judgment, courts properly consider all evidence of an antitrust conspiracy holistically. Actions that might seem otherwise neutral in isolation can take on a different shape when considered in conjunction with the surrounding circumstances. And Judge Posner said in the *High Fructose* case, "No single piece of evidence that we're about to summarize is sufficient in itself to prove a price-fixing conspiracy. The question is simply whether this evidence considered as a whole and in combination with the economic evidence is sufficient to defeat summary." Other courts, including *Broiler Chicken*, recently, *Clean Products*, and *SD3* have agreed.

And turning to the key features of Dr. Williams' difference-in-differences damages model that CDK challenges, the model does control for supply and demand factors and in unilateral conduct on the part of defendants. CDK claims, and you just heard they claim, that the model fails to account for defendant's unilateral market power; not true. In a difference-in-difference model, any factor present in both the benchmark pre-conspiracy period and damages period cancels out and therefore cannot affect the estimated overcharges.

In order for CDK's claim to be correct, CDK and Reynolds unilateral market power would have had to increase in

the damages period relative to the pre-conspiracy period, but neither CDK, nor its experts make this contention. In addition, CDK claims that the model fails to account for exclusive dealing provisions in defendant's contracts with vendors. Again not true.

CDK acknowledges, and Mr. Scodro stated in his earlier summary judgment argument today, that the exclusive dealing provisions existed in defendant's contracts with vendors prior to the conspiracy. Thus, any impact in those provisions on defendant's integration services prices would already be baked into the prices of the benchmark pre-conspiracy period and cannot be the cause of any estimated overcharges. Defendant's motion to exclude the testimony and analysis of Dr. Williams should be denied.

THE COURT: Okay. Thank you so much. I appreciate it. It's a good thing I like *Daubert* motions. We're up to 873, I believe, and this is Murphy. And so Mr. Panner and Ms. Wedgworth will be sharing this one, it looks like. So if you're still up, Ms. Wedgworth, go right ahead, and if not, you can stand aside for a minute for Mr. Panner. Thank you.

MS. WEDGWORTH: I'll be brief. I'll be brief, your Honor. So here we go. Dr. Murphy's pass-through regression analysis and his criticism of Dealers' expert's analysis should be excluded. Dr. Murphy assumes facts not present in this case and his methodology is inconsistent with how all market

participants describe the data-integration feed to dealers. Dr. Murphy argues that rather than examining data-integration fees charged by vendors to dealers, the pass-through analysis should examine total charges by the vendors to dealers, meaning the sum of the DIS fees and the app fees and the app prices.

Dr. Murphy incorrectly reasons that the sum of DIS fees and app prices must be considered because he claims the alleged conduct could have caused dealers to have successfully negotiated a different lower price to offset in the app market -- to offset any increase in the data-integration fee. This analysis is wrong as small unrelated changes in DIS -- I'm sorry -- in app prices swamp changes in the data-integration fees, preventing Dr. Murphy's regression from measuring pass-through rate reliably.

Dr. Murphy found for two vendors a negative pass-through rate and for one vendor a positive pass-through rate of over 1,000 percent. These results demonstrate the fundamental unreliability of his method.

And, lastly, Dr. Murphy cites no evidence in support of the inclusion of the app prices in his pass-through regression. Dealers and Dr. Williams have cited case law and extensive evidence to the contrary. And I'll just cite to you the *Lobe vs. Sumitomo* case from the Seventh Circuit.

THE COURT: Okay. Great. Lateral.

MR. PANNER: Thank you, your Honor. Professor Murphy

is CDK's damages expert and his principal opinion, and the one at issue in our motion, is that "In the absence of conspiracy, CDK would have engaged in the same conduct unilaterally, and therefore there are no damages or minimal damages." And that's in his report at paragraph 45. And that testimony should be excluded because it is contrary to the legal principle that a wrongdoer cannot escape liability by asserting that it could have accomplished the same ends lawfully. And that's the *Story Parchment* case, 282 US 555. And a number of cases from the Courts of Appeals and District Courts that we cited in our papers.

Now, CDK argued that *Story Parchment* doesn't apply because damages causation was disputed. They say that plaintiffs must establish a causal link between conspiratorial conduct and damages, and that's the issue. But there is no dispute here that defendant's conduct caused the harm. The dispute is over whether the conduct was pursuant to conspiracy, and if it was, everyone agrees for the present purposes that it was illegal. Accordingly, CDK cannot avoid liability by arguing that it would have engaged in the same harm-causing conduct in a but-for world without the conspiracy.

CDK also argued that plaintiff somehow opened the door by opining that damages would have been the same based on unilateral conduct. This is a theme that has been mentioned a number of times with respect to Dr. Israel's testimony. And I

should have addressed it before, so I'm glad to have the chance to address it now. There's no correspondence between Dr. Israel -- Dr. Israel's opinion and Dr. Murphy's opinion. Even if there was some sort of opening-the-door principle that could apply here, which there is not.

On the contrary, Dr. Israel's testimony shows that CDK's unlawful conduct caused the same harm whether it was unlawful under Section one or Section two or both. Mr. Provance referred to this as being an exclusive dealing claim; that's not right. It's a monopolization -- after-market monopolization claim, and that's quite sensible. Now, Dr. Murphy wants to say that CDK's conduct was unlawful and caused harm but that CDK could have inflicted the same harm through lawful means, and that is what is not legally permitted.

Now, we used an example in our reply brief that I think illustrates the issue here and the problem with why Dr. Israel's testimony is quite sensible and Dr. Murphy's testimony should be excluded. If one assumes a conspiracy among makers of printers to tie ink to the printer, there is no doubt that three printer manufacturers, if they entered into a horizontal conspiracy to tie, would be engaged in a per se violation of the antitrust laws. And in figuring out the harm inflicted by the tie, one could figure out, you know, the inflation in the price of ink or what have you.

If -- but they might say, "Well, we didn't conspire. We simply all engaged in time laterally." In that case, one might say, "Well, but your tie -- even if you acted unilaterally, it's still an illegal tie, and therefore the harm caused by your conduct is the same whether it was conspiratorial or not." And that would be entirely appropriate testimony and it would not be a justification for saying there is no harm to say, "Well, the unilateral tie would have been lawful. And I think that Manufacturer A would have engaged in that tie, even in the absence of an agreement, and therefore there are no damages."

Dr. Israel does what's entirely logical and permitted. Dr. Murphy does what's legally barred. Thank you, your Honor.

THE COURT: Okay. Thank you both. Mr. Provance you have been ganged up on. So you have to respond to two people, so you're up. And that's good. I've got your screen.

MR. PROVANCE: Thank you, your Honor. Plaintiffs' motion to exclude Dr. Murphy's testimony is narrow. They don't challenge his credentials or most of his testimony. And on the two issues where they do seek exclusion, Dr. Murphy's opinions are both relevant and admissible. And I will take them in the order they were just presented.

Regarding pass-through, as Dr. Murphy explains, the Dealers' expert, Dr. Williams, found incredible pass-through rates, exceeding 100 percent of the claimed overcharges. So

based on Dr. Williams' pass-through opinions, the Dealers are actually claiming more in damages than the Vendors are claiming in direct purchases. But Dr. Williams only considered the charges that Vendors separately list on their invoices as "DMS fees or similar." He ignored other components of the app price. That methodology is flawed. Among other things, it ignores offsetting discounts in other elements of the app price, which reduce the net pass-through rate.

The Dealers' own expert, Dr. Williams, disputes Dr. Murphy, but that isn't really surprising, and it's not a reason to exclude his testimony. First, Dr. Murphy's opinion is supported by generally accepted economic theory. You can't calculate passthrough by looking only at a line item on an invoice or invoices that vendors call DMS fees and ignore everything else. In fact, many vendors don't separately itemize DMS fees on their invoices, and the implication of Dr. Williams's logic would be then that the pass-through rate for those vendors is zero. Obviously, that is not the right approach. Dr. Murphy gave a detailed explanation of this at his deposition, and we attached the relevant portions as Exhibit 6 to our brief.

Second, Dr. Murphy's opinions are supported by the record. There is evidence of vendors offering discounts to dealers on their overall app prices in order to offset DMS fees, exactly what Dr. Williams ignores. We attached that

evidence as Exhibit 8 to our brief and discuss it at page 20. You were just told there was no evidence of that. We attached it and provided it. And that evidence doesn't relate to some small-time vendor who is not at issue in this case. It relates to AutoLoop, the putative class representative.

Moving to Dr. Murphy's opinions regarding plaintiffs' but-for world from which they used to calculate damages. As we've explained this is a case where the plaintiffs' experts say that CDK and Reynolds had market power to raise their prices unilaterally, but attribute all of their price increases to the alleged conspiracy. And the evidence establishing that is in the paragraphs of the reports and the pages of deposition testimony from plaintiffs' experts that you now see on the screen.

This implies a but-for world where defendants could have raised their prices, but would have never done so. Dr. Murphy's opinion is that such a but-for world is not rational. Dr. Murphy is not opining that the damages from any alleged conspiracy are necessarily zero or that there could not be any damages. At paragraph 47 of his report, which is Exhibit 1 to our opposition. Dr. Murphy says, "Incremental damages from conspiracy, given plaintiffs' expert's own analysis, are either zero or, if positive, would have to be measured relative to the price impacts resulting from unilateral actions by CDK, which neither expert has done." The

second part of that sentence is critical to understanding the opinion that Dr. Murphy is actually giving in this case, as opposed to the caricature of his opinion that was just described.

The opinion is not speculative. It's grounded first and foremost in what the plaintiffs' experts say in their own reports and depositions, and Dr. Murphy went beyond just what the opposing experts said. He relied on additional economic evidence in the record, and that's discussed at pages 4 through 10 of our brief. Dr. Murphy's opinion is also consistent with the framework, which has been described by several presenters thus far today.

As they've explained, even if plaintiffs prove a conspiracy, their damages model still must account for and separate price effects attributable to defendant's unilateral market power. It's fully consistent with the legal framework for Dr. Murphy to explain why plaintiffs' damages models fail this requirement. Plaintiffs are overreading Story Parchment to suggest it upends these principles, which have been endorsed in cases like *Marshfield Clinic* and *MCI* from this Circuit, and even the Supreme Court's own more recent decision in *Comcast v. Behrend*.

No Court has applied *Story Parchment* in the manner that plaintiffs suggest here. Most pointedly, I would refer to the *RSC* decision cited in our brief, which holds that relying

on *Story Parchment* is "totally inappropriate when the issue raised is causation of damages." Here there's absolutely an issue as to whether the alleged conspiracy is responsible for causing 100 percent of the price increases in the damages period.

In short, plaintiffs' narrow *Daubert* motion to exclude Dr. Murphy should be denied. Thank you.

THE COURT: Okay. Thank you all for that. I think we have seven left and six of them are at the speed round of two minutes per side, and then there's one in here that is sneaking in at five minutes. So this next one, just to keep the record clear, is 887, and it's the defendants' motion to exclude Halpin, and so I think I've got Ms. Stride on one side and Ms. Weber on the other; is that right?

MS. WEBER: Yes, your Honor.

THE COURT: So fire away. I can see your screen, so thank you.

MS. STRIDE: Thank you, your Honor. Defendants seek to exclude the opinion and testimony of Brian Halpin because those opinions are firmly centered in an undisputed issue. Mr. Halpin's opinions set forth the creation date and last modified date of a Microsoft Word document authored by Authenticom's CEO, Steven Cottrell. But those dates aren't in dispute. And Mr. Halpin offers no opinion on any disputed relevant fact. The only disputed issue that individual

plaintiffs can point to is whether Mr. Cottrell was accurate with respect to the content of what he wrote in the document.

But, of course, Mr. Halpin cannot testify to whether Mr. Cottrell was accurate. And to his credit, Mr. Halpin admitted at his deposition that he is not opining on that topic. The defendants have offered to stipulate to the document's creation and last modified dates in order to simplify the trial by removing this issue from the many that actually will need to be addressed. But individual plaintiffs refused to either accept that stipulation or withdraw Mr. Halpin's report, which forced defendants to move to exclude testimony on an issue that no one disputes.

Individual plaintiffs claim in their brief that defendants' offer was a "strategic stipulation," but they have no basis for that conclusion. Beyond all of that, Mr. Halpin's testimony would not only be minimally probative, but unduly prejudicial as well.

The only reason for plaintiffs to offer him at trial is to confuse the issues by conflating the authenticity of the document for the accuracy of its contents for the credibility of Mr. Cottrell. Mr. Cottrell is a key witness for the individual plaintiffs. And they should not be allowed to use Mr. Halpin's opinion on an undisputed issue to sponsor the content of what Cottrell wrote or to bolster Mr. Cottrell's credibility on issues that are in dispute. Thank you, your

Honor.

THE COURT: Okay. Thank you very much. I appreciate it.

Let's see. Ms. Weber. Thank you.

MS. WEBER: Thank you. Good afternoon, Judge Dow. Jayme Weber for plaintiffs.

Defendants do not question Halpin's qualifications, nor the relevance of the document, nor even the relevance of its authenticity. Instead, they argue they can make Halpin's testimony irrelevant by not disputing when Cottrell authored his notes.

But defendants confuse relevant with disputed. The Seventh Circuit recognized in *Gomez* that evidence may be relevant even if not disputed. When Cottrell authored the notes is relevant regardless of defendants disputing it. That is why cases like *Old Chief* hold that a party may insist on presenting evidence, even when the other sides offers to stipulate.

The Seventh Circuit's citation to this rule in *Swiatek* did not suggest, as defendants do, that it applies only to the prosecution in a criminal case. As you heard earlier, there is testimony from Cottrell that if credited (inaudible due to poor audio) a per se antitrust violation. That makes Cottrell's written record of an appraised admission all the more significant. And the contemporaneous nature of that record all

the more important.

Rule 401 says evidence is relevant if it has any tendency to make a fact more or less probable, and that fact is of consequence in determining the action. Halpin's testimony makes it more probable that Cottrell's notes were authored the day after McCray's admission. The contemporaneous nature of Cottrell's notes will be of consequence to the jury in assessing whose version of events to believe; thus Halpin's testimony is relevant. *LovePop* and other cases show document metadata specifically may be relevant and calls for an expert.

Finally, Rule 403 does not bar Halpin's testimony. To start, periphery issues are better resolved in the context of trial than in the abstract. Moreover, there is no reason to think jurors will mistake testimony about document metadata for testimony about the document's content. Defendants' 403 claim comprises arguments that go to weight, not admissibility, plus unrealistic concerns about juror confusion. The motion should be denied. Thank you.

THE COURT: Thank you very much. I appreciate it. Sorry you've been cat-bombed.

Okay. We're back to the five-minute motion, which is Lawton, and so we've got, let's see, Mr. MacDonald and Mr. Ho; is that right?

MR. MACDONALD: That is correct, your Honor.

THE COURT: Mr. MacDonald, I can see your screen so

you're ready to go.

MR. MACDONALD: Your Honor, on the eve of the alleged conspiracy, Authenticom earned an annual net profit of $3.4 million. Authenticom's damages expert Catherine Lawton, however, calculates that as a result of defendants' conduct, Authenticom has lost up to $144 million in profits. In other words, she assesses 42 years' worth of pre-conspiracy profits as the damages Authenticom suffered in this case.

Now, how does Lawton get there? Lawton arrives at that conclusion through the use of what she calls yardstick analysis, visualized here in Figure 8.3 of her report, by which she claims to calculate Authenticom's connections, which she identifies as a single application paying Authenticom to scrape data from a single DMS to three different types of systems. One, CDK, which she identifies in orange; two, Reynolds, blue; and, three, what she identifies as other DMSs, gray. And the premise of her damages model is that she assumed that post-conspiracy the blue and orange lines would grow at the same right as the gray line. And any disparity between those growth rates, she calculates entirely as damages.

The first problem is that Lawton did not actually perform a proper yardstick analysis. Because the gray line is not a yardstick at all. It is not a comparison market, a comparison firm, or a comparison product. Post-September 2013, most of the growth actually consists of connections to Reynolds

and CDK dealers, not other DMSs.

And just a couple of examples. First, Lawton admitted at her deposition that she mischaracterized a number of large Reynolds and CDK dealership groups as other, rather than as Reynolds or CDK at her deposition. This includes some of the largest dealership groups in the country. The orange and blue lines, as she admitted, should be much higher and the gray lines should be much lower.

Secondly, during the damages window, Authenticom acquired, via corporate acquisition, an inventory application called CarPod. CarPod is not a DMS, it's an application. And it's used by all sorts of dealers to manage inventory on their lots, some of whom use the Reynolds CMS, some of whom use CDK and some of whom use another DMS.

Lawton then counts all of these connections to CarPod, Authenticom's own inventory product, as connections to other DMSs in her analysis, rather than counting them as what they are, which are connections on behalf of Authenticom's own application to Reynolds and CDK dealers. And the acquisition of CarPod and the relabeling of CDK and Reynolds' connections as CarPod connections, in fact, accounts for the majority of the growth in the other DMS line in Figure 8.3, the majority of damages. If you look at the big growth in the gray line in 2017 and 2018, these are entirely CarPod connections that Authenticom has imported into its data. This is not actual

growth and paid connections to third-party DMSs on behalf of third-party vendors.

This raises an additional issue. The only analysis that Lawton performed to justify the yardstick is a correlation analysis. She claims that the three colored lines correlated before September of 2013. But that doesn't help her methodology because post-September 2013, the other DMS line does not consist of the same basket of goods as it did pre-September 2013. Just for one example, it includes all of these CarPod connections.

So Lawton did not actually perform a yardstick. She didn't isolate her variables. But even if she had and the model was what she says it is, it still fails. For a yardstick to be admissible, it has to be independent of the alleged illegal conduct, it has to be comparable, and it has to exclude harm caused by other factors. Lawton's yardstick fails all three.

First, it's not independent. Both Authenticom's CEO and Lawton testified that Authenticom's competitors, particularly in the other DMS space, exited the market during the damages window, allegedly as a result of defendants' conduct. Therefore, all of the post-2013 connections, the gray line, even putting aside the other issues, are necessarily inflated. They do not reflect what Authenticom's trend line would have looked like in a but-for world, because in such a

world Authenticom admits it would have substantially more competition than it does today.

Second, the lines are not comparable. Again, I will give one example. Lawton admits that even under her analysis that Reynolds' trend line stopped correlating with the yardstick prior to the conspiracy as a result of Reynolds' unilateral decision to block third-party data rippers before September of 2013. In other words, she admits that the yardstick is not a good proxy for at least Reynolds' connections, but then proceeds to use it as proxy for damages.

Finally, Lawton admitted that as much as 100 percent of Authenticom's damages could alternatively be explained by the fact that defendants' DMS contracts with their dealers prohibits hostile access. It's undisputed that these contracts pre-existed the conspiracy allegations in this case, and they were actually the subject of a now dismissed exclusive dealing claim. That means that most, if not all, of the damages Lawton calculated can be attributed to something other than the alleged conspiracy, actually a dismissed claim.

Finally, cross-examination does not fix these problems. They are fundamental. The basic components of the model are not what Lawton claimed them to be, and therefore the model does not and cannot measure what Lawton claims the model should measure. It cannot offer any reasonable approximation of damages in this case, and it certainly does not justify how

a company with under $4 million in annual profits could suffer $144 million in lost profits. We request that it be excluded.

THE COURT: Okay. Thank you, Mr. MacDonald.

I think, Mr. Ho, you've got the response.

MR. HO: I do, Judge Dow. Thank you very much. It's telling that Mr. MacDonald starts with the conclusions that Ms. Lawton offers, which, of course, are not what *Daubert* trains on. *Daubert* trains on the methodology. And as to that, there's no dispute about three points.

One, there's no dispute that Ms. Lawton is qualified in business valuation and economic damages. Two, there's no dispute that a yardstick method is a standard damages methodology for measuring lost profits caused by an antitrust violation. And, three, there's no dispute that the construction of a reasonably comparable yardstick is a matter of professional economic judgment. There are no bright-line rules. And those three undisputed propositions lead to the conclusion that defendants' challenges to the way Ms. Lawton applied the yardstick methods, these facts go to weight and not admissibility, to credibility and not reliability.

We cite the *Tawfilis* case, which is from the Central District of California from 2017. 2017 Westlaw 3084275, which is really quite on point. Arguments about what factors and experts should have controlled for in conducting a yardstick analysis generally go to the weight, rather than the

admissibility of the expert's testimony. That's consistent with the Seventh Circuit's decision in *In Re High Fructose Corn Syrup*, which refused to exclude a regression analysis based on criticisms of what variables had been selected, included, or omitted. And it's consistent with your Honor's decision in the *Fluidmaster* case, which emphasized that whether a party's model is the most accurate is ultimately a merits decision.

Judged against that standard, Ms. Lawton's yardstick is imminently reasonable. She compared Authenticom's performance with CDK and Reynolds' DMS customers, those are the customers that were affected by the conspiracy, to a yardstick composed of Authenticom's other transactions. Contrary to what Mr. MacDonald said, using Authenticom's own other transactions starts from a far more comfortable place than most yardsticks, which compare the performance of one company against the performance of other companies or maybe companies in (inaudible due to poor audio) together different markets.

We're talking here about comparing Authenticom's performance with respect to other DMSs. That's a very strong and reliable starting place. What Reynolds quarrels with is whether certain Authenticom transactions should have been categorized as CDK or others. You heard Mr. MacDonald allude to that. But those arguments can't warrant exclusion for three basic reasons that apply to, essentially, all of the specific criticisms of her yardstick.

One, Reynolds is contesting her interpretation of the underlying data, not her methodology, and that's a factual issue, not a ground for exclusion. The Seventh Circuit made that very clear in *Manpower*, where it held that the "quality of the data is not a proper consideration in assessing reliability and reversed exclusion of an expert on that ground."

Two, as mentioned, these are judgment calls. Again, there's no right or wrong answer. And she gave reasoned explanations for all of her modeling choices. And, finally, Reynolds's own expert, Dr. Rubinfeld, had no disagreement with Ms. Lawton on many of the points that defendants now raise in their motion when he constructed his own alternative damages calculations. These are really lawyer arguments, and they're properly suited for cross-examination at trial.

The only specific argument that Mr. MacDonald made that I want to address is this issue about CarPod. As we explain in the brief, the fact that Authenticom owns CarPod does not affect the appropriateness of its inclusion in the yardstick, because it's the dealers that drive demand for Authenticom services. And so even though Authenticom owns the entity that is making the connection, it cannot make that connection unless the dealers ask for it. And so as Ms. Lawton explained, that's an appropriate reason to include it in the other. Thank you, your Honor.

THE COURT: Okay. Thank you, Mr. Ho. And what you

said a minute ago is a good segueway because now you're about to go after Rubinfeld, right?

MR. HO: I am.

THE COURT: I just want to say this is 867, just so I can have a little break there in the record. So that's the motion we're talking about now. Go ahead, Mr. Ho.

MR. HO: Thank you, your Honor. I'll try to make this quite short. I have no quarrel with Professor Rubinfeld's credentials. He is obviously impeccably credentialed. Defendants want to use those credentials to put him in front of a jury and say that plaintiffs owe them billions of dollars in counterclaim damages.

But his deposition revealed that he was nothing more than a mouthpiece for opinions that he couldn't articulate, never mind give reasoned explanations for. He was completely unfamiliar with the facts of the case and the reports that were submitted under his name. He could do little more than read the words on the page and then tell me that I would have to go ask his staff if I wanted more of an explanation.

He had to correct his testimony after consulting with counsel at breaks multiple times, to the point where defendants' exasperated lawyers blurted out answers for him twice during the deposition. And even then he had to serve substantive corrections in his deposition errata. Your Honor asked for the key evidence and the key law.

I would say the key evidence here is just the videotaped deposition of Dr. Rubinfeld's testimony, which we would encourage your Honor or your law clerk to review. And the law is straightforward. Rule 26 doesn't permit parties to put on puppets at trial. And there are many cases that exclude experts who couldn't explain their opinions. The *Dataquill* case from this Court from 2003, the *Whites* case from Southern District of Iowa, and another case from this Court, *Baxter International*, all of which were cited in our brief. We think that the principles of those cases apply squarely to Dr. Rubinfeld's testimony, which should be excluded.

THE COURT: Okay. Thank you, Mr. Ho.

Mr. Ross, you've got the back half of this one in speed round here.

MR. ROSS: Thank you, your Honor. First, very briefly regarding the deposition, as explained in our briefing, plaintiffs' characterization of this transcript is not accurate and it's not fair. The excerpts they picked for their motion are at worst lapses in memory, not grounds for exclusion. This is covered beginning at the bottom of page 5 of our brief, which is Docket 994. To Mr. Ho's point, if the Court somehow has time for this, we would be delighted for your Honor to read or watch this deposition. Your Honor will see the context of these questions and will see counsel refusing again and again and again to let Dr. Rubinfeld consult various documents that

he needed to see.

It's obviously not practical to engage in a back-and-forth about specific questions and answers from the deposition in the time we have here. So for today I would just like to make one global point about this argument, which is that even if plaintiffs' criticisms of Dr. Rubinfeld's testimony had merit generally, which, of course, we disagree with, plaintiffs never connect the dots as to which of Dr. Rubinfeld's opinions should be excluded on that basis. Instead, they take the sweeping position that all of his opinions should be excluded. Respectfully, that just doesn't make sense.

One example to illustrate the point. Dr. Rubinfeld has an entire report devoted to rebutting the plaintiffs' expert in the MVSC case. Plaintiffs' motion doesn't mention a single deposition question or answer regarding the MVSC case. The testimony they highlight had nothing to do with the MVSC opinion. That's just one obvious example, but there are others.

In my remaining time, your Honor, I would like to turn to just two of the specific arguments raised by plaintiffs. First with respect to one of Dr. Rubinfeld's rebuttals to Ms. Lawton's damage model for Authenticom. This is the one that Mr. MacDonald just talked about. Plaintiffs argued that Dr. Rubinfeld is somehow masquerading as a liability expert.

That's not accurate. Just like Mr. Provance explained a moment ago in connection with the Murphy motion, this is a causation issue, not a *Story Parchment* issue. It's discussed pages 11 to 12 of our brief. But the point they're referring to is simply Dr. Rubinfeld observing that based on the positions stated by plaintiffs' own experts, including Ms. Lawton, there can be no causation.

Lastly, with respect to Dr. Rubinfeld's counterclaims damages model in Authenticom. Plaintiffs criticize the data that Dr. Rubinfeld relied on for the number of times Authenticom accessed Reynolds' system. But critically in discovery, Authenticom's counsel described this supposedly unreliable data as the data that Authenticom maintains in the ordinary course regarding its DMS connections. That's in Exhibit 2. It's Docket 994. Thank you, your Honor.

THE COURT: Okay. Thank you both.

I think we're up to 859, which is motion to exclude Stroz, and Mr. Kupillas is back.

MR. KUPILLAS: Thank you, your Honor. As a preliminary matter before I begin, I just want to note that due to the settlement between CDK and Authenticom, I will not be addressing the arguments raised in this motion concerning Authenticom's alleged responses to CDK's CAPTCHA and yes/no prompts.

This motion concerns defendants' cybersecurity expert,

Edward Stroz. First, Stroz's opinions concerning the Profile Manager program should be excluded. His opinion on the number of times Profile Manager merely ran is irrelevant. Because a program running without effect cannot violate the DMCA. Stroz's opinion on the number of times that the Warrensburg dealers' logins were re-enabled by Profile Manager is unreliable. Because it's not based on any evidence of any Warrensburg login accounts ever being re-enabled by Profile Manager. And by failing to respond to this argument, CDK has conceded its validity.

Next, Mr. Stroz's failure to specifically attribute alleged DMCA violations to specific dealerships renders his opinions unhelpful to the jury and subject to exclusion.

Stroz also opines that the creation of APIs, or application program interfaces, for use by third parties would not adequately address defendants' security concerns from third-party access. But his opinion is wholly unsupported and unreliable. Stroz performed no analysis of the security of APIs, nor did he examine the use of APIs by other DMS providers.

Stroz also offers an opinion on the number of times that Authenticom accessed purported proprietary data in CDK's DMS. But his opinion is based solely on CDK's representations as to which data were proprietary. And Stroz did nothing to validate those facially inaccurate representations, as he was

required do as an expert.

And, finally, your Honor, Mr. Stroz impermissibly offers his own legal opinion that dealers did not have the contractual right under their contracts with defendants to give DMS logins to third parties. Experts are not permitted to offer legal opinions, and Stroz is not a legal expert. His opinions on the interpretation of dealers' contracts with defendants and whether Authenticom's access to the DMS was contractually authorized or unauthorized should be excluded. Thank you.

THE COURT: Okay. Thank you, Mr. Kupillas. I appreciate it.

Mr. Fenske, you've got the defense of Stroz, right.

MR. FENSKE: I do, your Honor. I'm going to share my screen. If you could just let me know if you are seeing my screen, I would appreciate it.

THE COURT: Sorry. I am seeing it. Thank you.

MR. FENSKE: Great. I will go to the next slide here.

Your Honor, as Mr. Kupillas mentioned, the CDK settlement with Authenticom moots a large number of the issues raised in the briefing. I'm going to address a few of the issues that are no longer -- that are still alive.

The first has to do with the DMCA calculations as to the violations of the DMCA by Warrensburg. As to that claim, Mr. Stroz determined that Profile Manager actually re-enabled a

disabled Warrensburg account at least 36 times, beginning in March of 2017.

The basis for that opinion was evidenced that beginning in 2016, CDK sent instructions to disable targeted accounts at least once per day, and that by February of 2017, CDK had increased the frequency of those instructions as shown by evidence that Profile Manager had re-enabled a disabled account up to four times in one day over a two-week period. I'm not sure what Mr. Kupillas was referring to when he says we didn't respond to this, Your Honor. I would just refer the Court to our discussion of Exhibit O to plaintiffs' opening brief and Exhibit 19 in our opposition brief, which lays out this evidence.

In light of that evidence, Profile Manager, which worked, your Honor, by scanning the system constantly to see if a targeted account had been disabled and then automatically re-enabling it, would necessarily work on average at least once per day and likely many, many more. So Mr. Stroz's opinions are founded on record evidence and are rationally connected to that evidence, which is all that is necessary for his opinion to be admissible.

As to the DMCA claim against Continental, the only argument that plaintiffs made as to Mr. Stroz's CAPTCHA analysis relates to his methodology for determining if they had a particular account was, in fact, used by Authenticom. On

this issue, your Honor, the Continental dealerships, specifically, is an easy case. The name of the account in question is "DVault," a clear reference to Authenticom's Dealer Vault tool. And the record shows that DVault used automated means to respond to CDK's CAPTCHAs 1,256 times, as shown in Exhibit 4 to our opposition brief. That's all a jury would need to determine that this was an Authenticom account.

On Mr. Stroz's cybersecurity opinions, the plaintiffs do not challenge that he's imminently qualified to opine that hostile third-party access poses grave risks to both the DMS and the data on it, instead only challenged three narrow opinions of Mr. Stroz. Those challenges are meritless for the reasons explained in our briefing. Thank you, your Honor.

THE COURT: Thank you both on that discussion. We've got three to go, and the next one is 863, which is the motion to exclude Klein. So Mr. Caseria. And, let's see, I've got your screen, too. Thank you.

MR. CASERIA: Okay. Let me pull this up here. Thank you, your Honor.

Gordon Klein's opinion should be excluded for a number of reasons. First, his opinions regarding the California EVR market are not even his own. He takes the opinions of Joe Nemelke, MVSC's COO, which are attached as Exhibit H, and he offers them as his own. This is the opinion of his client, cloaked with expert window dressing.

When we asked him about this at his deposition, he readily admitted. And he said that his opinions were fundamentally Joe Nemelka's opinions; his word. When we asked him if he did anything to test those opinions, he said, "No." When we asked him if he was actually assuming causation in California, he said, "That's fair." When we told him there was evidence contradicting what was set forth in Mr. Nemelka's declaration, he told us that he could elevate the declaration above contrary evidence. The *Local Steel Products* case says, "An expert cannot act as a mouthpiece for its client," and that's precisely what has happened here.

In Wisconsin he ignores -- Klein ignores contrary evidence. As I mentioned earlier today, a 2017 letter from the State of Wisconsin to MVSC informed it that the state was closed to new EVR providers and had been closed and might reopen in 2019. Klein never looked at this document. When we showed it to him at his deposition, he told us that if the words on the document were true, it was pretty clear that Reynolds did not cause harm to MVSC.

Two additional reasons Klein's opinion should be excluded. Klein does not disaggregate lawful from unlawful causes of harm. To take just one example at page 45 of his deposition, which is at Exhibit A, he admitted that he does not disaggregate unilateral conduct from joint conduct with respect to damages. The only claims against Reynolds that are brought

by MVSC, and remaining in this case, are claims based on conspiracy, not unilateral conduct.

Finally, Klein's opinions that the conspiracy was the "substantial factor causing harm to MVSC should be excluded because they are based on nothing more than intuition." When we asked him to describe his methodology, he couldn't describe anything that could be tested or replicated and instead told us that as an observer of business decisions, he was able to determine when something is a substantial factor and when something is a secondary and not substantial factor. As the Seventh Circuit in Zenith held, "Intuition won't do."

Thank you, your Honor.

THE COURT: Okay. Mr. Nemelka, you've got the defense here, right?

MR. NEMELKA: Yes. Thank you, your Honor.

Mr. Klein calculated MVC's damages for the defendants' effort to deny MVSC access to dealer data, whether through the group boycott or blocking independent (inaudible due to poor audio) integrators. Klein calculated those damages caused by that unlawful conduct. There is no failure to disaggregate. Klein's model was designed to measure only damages due to that interference, not other causes.

Although Klein attributed identical damages to the Section 1 and Section 2 claims, doing so was appropriate because the monopolization claims were premised on the same

anti-competitive conduct and the facts of the Section 1 claims, the efforts to deny MVSC access to dealer data.

As to Mr. Klein's reliance on Joe Nemelka's declaration -- and, yes, that is my brother -- it is proper and sound for experts to rely on declarations from their clients. Especially where, as Mr. Klein did here, he verified the accuracy of the data supplied to him by revealing other documentary and testimonial evidence regarding the specific-loss dealerships. What Mr. Nemelka did was go through and identify the dealerships that they lost because of the (audio completely cut out), and Mr. Klein supported that by reviewing the other documents and other testimony. In any event, the soundness of factual underpinnings for Mr. Klein's analysis is a factual matter reserved for the trier of fact.

As for Wisconsin, Reynolds challenges Mr. Klein's causation opinion but not his damages opinion. And we would point the Court to Mr. Klein's report at paragraphs 29 and 48 through 49, and then his reply report at 38 through 40, where he provides the bases for that analysis. And as Mr. Caseria explained, the basic criticism that Reynolds has is that Mr. Klein did not take proper account of a single letter from 2017 from the Wisconsin DMV. But at his deposition, Mr. Klein noted the existence of other evidence, relied on in his opinion, that Wisconsin was considering around new EVR providers at the time MVSC attempted to enter that market.

My time is up and I would just note that with respect to Rubinfeld, Mr. Ho on the top side didn't get a chance to respond, but Mr. Rubinfeld did -- we did cite in our brief where Mr. Rubinfeld did not know the basic facts about MVSC's case either, and was very confused about what that matter was even about. And we did cite those in our brief. Thank you.

THE COURT: Okay. Thank you both. We are down to the last two, and this next one is motion to exclude Nancy Miracle. Mr. Wilkinson, I see you are back on screen here, so I think you've got the first shot here.

MR. WILKINSON: Thank you, your Honor. Back and ready to proceed.

Your Honor, Nancy Miracle is a computer professional offered by Authenticom to offer the core opinion that this Court and numerous other federal courts have misinterpreted the DMCA for years. In her opinion, the DMCA offers zero protection to CAPTCHA, because CAPTCHA is not a technological measure that effectively controls access as defined by the DMCA. She reaches this opinion based solely on her own experience.

She says essentially the same thing about all of defendants' other system security measures, including Reynolds Suspicious User ID Detection System and CDK's system prompts. In her view, hackers are free to do whatever they want to break through or get around these measures because none of these

measures are effective access controls under the DMCA. That's obviously intention with Authenticom's central claim in this case that these measures were highly effective in blocking its access to the defendants' DMSs and supposedly devastating Authenticom's business. She also offers the additional opinion that Authenticom's efforts to circumvent these measures were not actually circumvention at all.

These opinions fail the *Daubert* standard for multiple reasons, starting with the fact that she's clearly trying to offer opinions on a question of statutory interpretation, which is improper. Her proffered interpretation is also contrary to basically every DMCA opinion ever decided by the federal courts on circumvention claims like these. It's contrary to the text of the statute. And perhaps most tellingly, her opinion is contrary to all published standards within her own field of computer software, including National Institute of Standards and Technology, or NIS, which is the leading authority in the field.

Authenticom tries to pitch this as the standard battle of the experts. But when an expert tries to offer opinions contrary to the entire body of published law and a statute and standards in their field, based solely on ipse dixit experience, the proper course is exclusion. Ms. Miracle also offers some other ancillary opinions as well. They suffer from fatal flaws as addressed in our briefs. And for these reasons

we ask the Court to exclude her testimony and opinions. Thank you.

THE COURT: Okay. Thanks, Mr. Wilkinson. Mr. Dorris, you've got the other half of this one, right?

I think you're on mute.

MR. DORRIS: My apologies. Good afternoon, your Honor.

THE COURT: How are you doing?

MR. DORRIS: Ms. Miracle's testimony is admissible because she is qualified as a computer security and software expert and because her technical expertise in those areas will be helpful to the jury.

First, on qualifications, those are unassailable. Defendants really only challenge them in passing in their briefing. She has five decades of experience as a computer programmer and she's been responsible for network security at technology firms. That experience qualifies her as an expert.

Second, her testimony would be helpful to the jury. The reasons are all detailed in our brief, but I want to focus on two of them here. As your Honor is aware, and as Mr. Wilkinson just mentioned, there are disputes about the statutory construction of the DMCA. But on at least these two issues, Ms. Miracle's testimony will remain helpful to the factual finder, even if this Court adopts Reynolds' statutory construction.

First, did Reynolds circumvent technological measures? Ms. Miracle will explain how the technological matters at issue operate and how Authenticom's software responded to them. And, importantly, what Authenticom did not do: Circumvent as opposed to satisfy those measures. On this point, your Honor, it is important to note that defendants themselves proffer expert testimony on the technical nature of Authenticom's alleged circumvention. Ms. Miracle should be allowed to rebut that testimony as Scott Tenaglia's report at Docket 1007-1, pages 7 to 12.

The second issue is, did the technological measures protect copyrighted works? Ms. Miracle explained the way in which Reynolds's executable code could be accessed without encountering any technological measures. And so those measures did not protect the code. There is no DMCA violation as a result. Her testimony would also be helpful to the fact finder on determining copyright ability of visual elements. She will explain that visual elements are dictated by functional considerations. That is permissible expert testimony on a predicate fact, not expert testimony on the ultimate legal issue of copyright ability.

At bottom, Reynolds's motion is based on the assumption that Ms. Miracle will testify to legal issues because the report mentions legal standards governing her analysis. And I recommend to the Court Judge Filip's decision

in *Amakua Development LLC v. Warner*, 2007, 2028186, where he explained, "It is not exceptional at all for an expert to structure his or her report so as to conform to applicable law." That's all that Ms. Miracle has done. It will be left to the trial judge to enforce appropriate boundaries on her testimony about legal issues at trial.

Thank you, your Honor.

THE COURT: Okay. Thank you both.

I think we're down to the last. I don't know. You guys will have to tell me how to pronounce that. 883 is the docket number. And Mr. Ross and Ms. Jones, I think we've got, so Mr. Ross, fire away.

MR. ROSS: Thank you, your Honor. And it's Allan Stejskal as I understand it. Mr. Stejskal is a proposed industry expert the plaintiffs are offering to talk about a broad range of issues. Our motion is very targeted and based on two grounds. I'm only going to focus on the most important one of those grounds today, which is Mr. Stejskal proposed opinions on DMS customer switching. Now customer switching is an important economic issue in the case, just like it is in a lot of antitrust cases.

There have been huge volumes of data produced in discovery, by both parties. Both side have PhD economists that have analyzed that data and reached conclusions about switching. The problem that our motion explains in short is

that Mr. Stejskal is trying to offer an opinion on switching without looking at a single line of that data.

There's really no dispute about this. Mr. Stejskal candidly admits in his deposition that he looked at no data, performed no analysis. In fact, didn't even know that switching data had been produced. There is lots of testimony about this, but if the Court looks at page 49 of Mr. Stejskal's November 7, 2019, expert deposition, that should drive home the point.

Now, another way I think to think about this is that Mr. Stejskal is trying to offer an anecdotal subjective opinion about an inherently data-intensive quantitative subject. It's actually a little bit worse than that because Mr. Stejskal doesn't even point to any anecdotal examples of a dealer actually deciding not to switch DMS providers. He just says it's hard, essentially.

Now, how did plaintiffs respond to all of this? Basically, they argue that Mr. Stejskal has a lot of experience in the industry, and there is case law allowing expert testimony based on industry experience. Of course that's true as a general matter, but it doesn't mean you get to skip the Rule 702 analysis. In that respect, we would direct the court to Chief Judge Pallmeyer's analysis in the *Crawford Supply* case, where she notes "If the witness is relying solely or primarily on experience, then the witness must explain how that

experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." Plaintiffs and Mr. Stejskal come nowhere close to doing that for this opinion. That opinion, by the way, is 2011 Westlaw 4840965.3.

Now, I don't know if Ms. Jones is going to talk about specific cases in her response, but if she does, I would urge the Court to focus on whether those cases are custom and practice opinions cases, because I bet they are. And this is very -- we have very consciously chosen not to attack true custom and practice opinions for Mr. Stejskal. This opinion, as we talked about, is an economic quantitative subject that Mr. Stejskal is trying to opine on without undertaking the proper analysis or any analysis. Thank you, your Honor.

THE COURT: Okay. Thanks, Mr. Ross. Ms. Jones, you have the last word on the lawyers' side today, and my words will be very brief when we're done, so we're almost there. So thank you.

MS. JONES: Thank you, your Honor. Last but not late, Bethan Jones for the plaintiffs. Mr. Stejskal is a recognized industry expert. And I would like to just begin by noting that his testimony was recently credited by Judge Snow in the District of Arizona, in connection with other litigation involving defendants, and that's *CDK versus Brnovich*.

Now in forming the two opinions that defendants

challenge in their briefs, Mr. Stejskal reliably drew from over two decades of experience, making his testimony admissible under Rule 702. I'll briefly touch on the cybersecurity point that the defendants raised heavily in their brief.

And I think the main point there, your Honor, is that Mr. Stejskal need not be a cybersecurity expert to offer opinions about the use of data-integration services that are grounded in his experience. And it's important to remember that Mr. Stejskal worked with data integrators many years across the nation. He created DealerTracks integration program. And he also served as the president of Open Secure Access.

And in their briefing the defendants really tried to minimize the importance of that organization, but it's important to remember that that's a prominent coalition of over 50 industry stakeholders, including at one time CDK, then ADP, studied that issue in depth. Mr. Stejskal's opinion on that front will be really helpful for the jury to evaluate defendants' reported security concerns in blocking these independent integrators.

Similarly, defendants in their briefing take issue with Mr. Stejskal's opinion on data-security practices, and I'll just note that Judge Snow specifically credited Mr. Stejskal's testimony that dealers take data security very seriously.

Now, counsel focused on the highly relevant topic of DMS switching. And as you've heard today, the defendants' primary concern is that Mr. Stejskal did not perform an empirical analysis for what they claim is a quantitative market inquiry, but they notably cite nothing to explain why this is a quantitative marketing group and can only be a quantitative marketing group. There is no requirement that an expert perform quantitative market analysis. The Seventh Circuit made that clear in *Metavante*.

And Mr. Stejskal's testimony detailing both the hard and soft cases that dealers face when switching DMSs shows exactly why the inquiry isn't solely quantitative. Mr. Stejskal's testimony will provide helpful context to the jury to evaluate the parties' quantitative analyses.

And I'll briefly address defendants' claim that Mr. Stejskal does not provide any examples. He actually cites in paragraph 43 of his report, the instance of Hendrick Automotives, who faced such high switching costs that they ended turning back on the process.

And, finally, I'll note that *Crawford* is distinguishable. I think it's very clear from Mr. Stejskal's report that he really applies his experience in the industry and his many years of working with dealers, large and small, in analyzing the hard and soft costs that dealers face. Thank you, your Honor.

THE COURT: Okay. Well, thank you, everybody. This has been really fantastic and exactly what I was looking for. I really appreciate your time and your effort and your ability to stay very close to your allotted time. I also want to remind you all how much I appreciate that you all worked this beautiful schedule out without my involvement.

I think after hearing what I've heard today, we're going to have two more arguments. One is going to be on *Daubert*, and only *Daubert*, because it will be a lot easier for us to just take those issues, and, you know, we may have some methodology problems. We may have some connective reasoning, sort of joiner-type problems. We may have some opining on questions of law issues. There's all kinds of fun little *Daubert* projects that you all have for me. But I think it will make sense to have it one separate hearing where I give you all of my *Daubert* questions and we just focus on *Daubert*. We have got 10 motions on that ground. And then the other one we can save for the summary judgments, and the counterclaims, and everything else.

I just think *Daubert* will be so much more focused if we have a single overarching topic and then specific problems to explore. And then have a second one on the summary judgment. And I probably would do them in that order because some of the *Daubert* rulings may affect the summary judgment rulings.

But I will be in touch with you guys. I don't know that I need all of you. But, you know, you guys can -- your lead counsel can decide who you want to have at the *Daubert* scheduling hearing, and maybe we can do this by email. I'm not sure. We may just do a little scheduling hearing. And then we'll have a second one on the non-*Daubert* issues.

The real question is going to be when -- one issue on that is when can John and I figure out enough to be able to formulate the questions that we're going to ask you. The other is going to be that it appears based on the general order that was just entered a couple hours ago, maybe even while we were on this call, that we're going to be able to resume jury trials on April 5th. I have many, many criminal defendants in custody who are going to be asking me for trial dates immediately upon that.

What I'm not sure of is whether we're going to be restricted to starting one trial a day, which is where we were back in the fall when we were able to do a few trials. And once that unfolds, I'll have a better sense of weeks that I may be on trial and therefore unable to hang out with you all. And any weeks that I'm not on trial is probably a week I can hang out with you all. What I would have in mind is probably two sessions of half a day a piece, and I'll try to focus the questions for you all so that you can be responsive to the things that I'm worried about and not worry about the things

I'm not worried about.

So I will be back in touch -- at least with the lead counsel -- as soon as I figure this out. I'm guessing that it will be April when we have these hearings. The only thing that would push it is if I get multiple trial dates for criminal cases, and unfortunately for you all, those cases take priority even over an MDL, which is kind of at the top of the list for civil. And, unfortunately, we have pretty much been a year without being able to take care of our criminal defendants, even those in custody, so those will get immediate triage whenever Judge Pallmeyer tells me I can do it.

Any questions on the plaintiffs' side for me today?

MR. HO: Not from us, your Honor.

MS. WEDGWORTH: Your Honor, would you -- go ahead.

MR. HO: No. Go ahead.

MS. WEDGWORTH: Would you anticipate the experts themselves possibly appearing at the *Daubert* hearings?

THE COURT: I hope not, only because it would be more trouble for you guys and more expensive for you as well. But if there was some issue that I needed to take a testimony on and have you guys do a voir dire, essentially, before I could rule on the motion, that's a possibility, but I hope not. I will try to avoid that if I can. But if I can't, I can't. I have to keep a clean record here. So who knows. I don't think so, Ms. Wedgworth, but it might happen.

MS. WEDGWORTH: Thank you, your Honor.

THE COURT: Okay. Thank you. And, Mr. Ho, did you have anything else you wanted to add?

MR. HO: Other than to thank you for your time, no. Thank you very much your Honor.

THE COURT: Okay. Thank you, guys. How about for the defense side?

MS. MILLER: Your Honor, two quick questions. One, would your Honor like to have copies of the slides that all of the parties put on the screen today? And if so, we're happy to collect them and send them on to Carolyn.

And the second question relates to what we started out with at the beginning of the hearing. Namely, the motion you have taken under advisement with respect to Authenticom's motion against Reynolds. There is a brief reference in that motion to what AutoLoop, which is not a party to that motion, intends to try to do with these allegations against CDK, because, remember, CDK is not in the Authenticom case. So we would appreciate leave to file a very brief submission on the same day that Reynolds submits its opposition addressing those two small points as they relate to AutoLoop and CDK.

THE COURT: Yes. I think I put replies in the order. If I didn't, I intended to for that very purpose. I don't know who has a dog in the fight. Let's put it this way. It's clear who has a dog in the fight. It's clear -- but it may be others

who have a dog in the fight as well. If you have a dog in the fight, I just ask that you file the same day as the response brief so that the reply can take up everybody's positions.

MS. MILLER: Much appreciated.

THE COURT: And, then, on the other issue -- oh, the slides. Sure, absolutely. I was thinking of pulling my phone out and taking screenshots of what you guys put up because in some cases they weren't up for very long. I didn't do that. But, yes, if you -- I know both sides at some point or other had slides. I couldn't even keep track of who had the slides. But in the event that -- most of the slides looked to me like they were kind of summaries of the brief, anyway, and then you guys kind of read through it, so when I get the transcript, it will be pretty close, but it couldn't hurt to give me the slides, too. So I'll be happy to take them, and if you all collect them and just send them into Carolyn, that would be appreciated it.

MS. MILLER: Happy to do so, your Honor.

THE COURT: Everybody good for today? Anybody on the Reynolds side have anything they want to add?

MS. GULLEY: No. Thanks so much for your time today.

THE COURT: Okay. You guys are the best. Judge Fallon is right. This is why I want MDLs, so thank you. Have a good weekend. Those of you in the polar vortex, stay warm. If you're not, you're lucky. Thank you.

MS. WEDGWORTH: Have a good weekend.

(Proceedings concluded.)

* * * * * * * * * * *

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/Kristin M. Ashenhurst, CSR, RDR, CRR February 22, 2020
Kristin M. Ashenhurst, CSR, RDR, CRR Date
Federal Official Court Reporter